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Supreme Court of the United States

October Term, 1977

No. 77-1275

MARTIN B. GLAUSER DODGE CO.,
Petitioner,

v.

CHRYSLER CORPORATION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TOM P. MONTEVERDE,
MORRIS L. CHUCAS,
MAX L. LIEBERMAN,
PELINO, WASSERSTROM, CHUCAS & MONTEVERDE,
2300 Packard Building,
Philadelphia, Pa. 19102
(215) 665-8550
Attorneys for Petitioner.

RALPH S. SPRITZER,
3400 Chestnut Street,
Philadelphia, Pa. 19104
Of Counsel.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPINIONS BELOW.

The opinion of the district court is reported at 418 F. Supp. 158 and is reproduced at pp. A8-A32 of the separately bound appendix to this petition ("App."). The opinion of the court of appeals is reported at — F.2d — and is reproduced at App. A33.

JURISDICTION.

The judgment of the court of appeals was entered on November 14, 1977 (App. A61). A timely petition for rehearing was denied on December 14, 1977 (App. A63). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. Where a court of appeals concludes that a jury has properly found that defendants combined or conspired and injured one of the defendant's franchised dealers by their combined activities, may that court nevertheless grant judgment for the defendants N.O.V. on the sole ground that, because defendants gave valid business reasons for

their actions, ". . . the defendants' actions were not illegal under § 1 of the Sherman Act—*i.e.*, they did not constitute an unreasonable restraint" (App. 50)?

2. Is a jury justified in finding that a large automobile manufacturer unreasonably restrained trade in violation of § 1 of the Sherman Act when the manufacturer injured certain of its franchised privately-owned dealerships (PCs) by: (a) setting wholesale prices at levels for all of its dealers which were highly profitable to the manufacturer; (b) creating factory-owned retail dealerships (DEs) in the trading area of its franchised privately-owned dealerships; (c) causing those DEs to establish and maintain retail price levels which necessarily resulted in net losses or minimal profits from retail sales; (d) subsidizing, from manufacturing profits, the operations and operating losses of the DEs; and (e) failing to subsidize the operations of the PCs whose retail price levels are established by the operating practices of the DEs?

3. Can it be said that no "forward vertical integration" resulted from the manufacturer's policies, when a well-qualified expert testified that they would have that effect; when the manufacturer's figures showed that sales by factory controlled dealerships increased from 17 to 36 percent nationally and from 20 to 42.5 percent regionally over a seven year period while these policies were being implemented, and when the number of PC dealers in plaintiff's trade area declined dramatically then and at least one such dealer in addition to the plaintiff testified that his dealership was destroyed by the combination complained of?

STATUTE AND RULE INVOLVED.

This case involves Section 1 of the Sherman Antitrust Act (hereinafter "the Act"), 26 Stat. 209 as amended by 50 Stat. 693 and 69 Stat. 282, 15 U.S.C. Section 1, and Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. Section 15. These statutes are printed in the statutory appendix to this petition at p. 46.

STATEMENT OF THE CASE.

Introduction.

A. The Jury's Verdict and the Plaintiff's Claims.

This petition seeks review of a decision of the United States Court of Appeals for the Third Circuit entering judgment for the defendants N.O.V. after the plaintiff, following a six-week trial, recovered a jury verdict of $1,300,000 on a Sherman Act, § 1, claim in the United States District Court for New Jersey. That verdict was trebled as required by law, judgment was entered, and post trial motions filed by the defendants were denied in the district court after the plaintiff filed a remittitur of $201,225 to correct an error of $67,075 in the jury's assessment of the plaintiff's damages. The jury's verdict consisted of specific findings that (1) all of the defendants were parties to a combination or conspiracy (2) which unreasonably restrained trade and commerce, and (3) that the combination or conspiracy was the proximate cause of damage to the plaintiff (4) in the sum which the jury awarded.

The jury's verdict was based on its acceptance of the plaintiff's basic contentions of fact.

Specifically, the plaintiff operated a privately capitalized (PC) Dodge dealership. Its primary claim was that, during its life, that dealership was damaged, and ultimately was destroyed, because of operating policies followed by a substantial number of factory controlled ("DE") Dodge dealers with which plaintiff was obliged to compete, together with direct subsidies and other types of favoritism shown these dealers by the defendant Chrysler Corporation and certain of its subsidiaries, which subsidies and support were not provided to plaintiff and other privately capitalized Dodge dealers in that trade area. These subsidies and other forms of support, plaintiff contended, made it possible for the DE dealers to sell new Dodge automobiles at prices which private capital dealers such as the plaintiff could not afford to meet. The widespread and price-

emphasizing advertising engaged in by these dealers effectively established the retail prices at which plaintiff could in fact sell its new automobiles, just as Chrysler Motors Corporation controlled the price at which plaintiff could buy new Dodges for resale. In other words, plaintiff contended that, throughout its life, its business was squeezed by the defendants and their factory controlled Dodge dealers, and eventually that its business was destroyed by their combined activities.

In addition, plaintiff contended that, in 1969 and 1970, when Chrysler sales and profits declined sharply nationally, the Chrysler defendants, together with certain of their DE dealers in southern New Jersey, took a series of actions whose actual purpose, as well as their effect, was to destroy the plaintiff's business in order to obtain for the competing DE dealers the sales formerly made by the plaintiff.

B. The Issues Raised by This Petition.

Section 1 of the Sherman Act declared "[e]very . . . combination, . . . or conspiracy in restraint of trade . . . to be illegal". Subsequently, our courts have limited that proscription to those combinations and conspiracies which "unreasonably" restrain trade. Since 1712, courts of common law have held that otherwise permissible restraints must be deemed unreasonable if the effect of the anti-competitive conduct is more than is minimally necessary to accomplish even a desirable and well-intentioned objective.

In 1974, a federal jury—properly instructed by an experienced trial judge on this precise point--considered the justifications advanced by Chrysler Corporation and its wholly-owned subsidiaries for their anti-competitive behavior vis-a-vis Chrysler's privately capitalized dealers. Significantly, the defendants presented no independent evidence that such conduct was required or even desirable in the defendants' quest for increased interbrand sales during the years at issue. Furthermore, and in any event, the jury, affirmed by the trial judge, found the defendants' conduct to be unreasonable under all the facts. The Third

Circuit conceded that the record supported the jury's findings that the plaintiff auto dealer was injured by various anti-competitive (at the dealer level) acts of the combined defendants (App. A45-A47, A50). Nevertheless, the court reversed the jury's verdict and held that the defendants' "good intentions," *i.e.,* their desire to obtain a larger share of the interbrand market, rendered this conduct reasonable as a matter of law, and this despite evidence that such conduct had resulted in the totally unnecessary destruction of the plaintiff and other small, independent dealers who retailed defendants' products exclusively, in competition principally with defendants' factory-owned stores.

The decision has been rendered in total disregard of the law applicable to such facts as promulgated by this Court and echoed by other courts of appeal.

If not reversed, the impact of the Third Circuit's decision in this case will extend far beyond the injuries which will continue to be inflicted on the remaining private capital dealers of the automotive industry's "Big Three". By approving, as a matter of law, the many predatory practices engaged in by the defendants, the instant decision will encourage the adoption of such practices in all of America's oligopolistic markets. On the other hand, a reversal of the instant decision will serve notice to America's oligopolies—the assets of some of which exceed the assets of most of the nations on earth—that further unnecessary concentration, accomplished by predatory means such as those used here, is unlawful and not in the national interest.

Furthermore, this decision is not an unfortunate, but isolated, judicial aberration on the part of the Court of Appeals for the Third Circuit. During the past fifteen (15) years, not one private antitrust damage award has survived in that circuit unscathed. In prior cases, the Third Circuit has reversed jury verdicts on the ground of admission of improper evidence, exclusion of proper evidence or rulings of law which it found to be incorrect. This is the first case in which none of those factors was present and none is

offered as the basis for judgment N.O.V. Here, we submit, the Third Circuit impermissably substituted its finding for that of the jury on the issue of the reasonableness of the defendants' conduct.

The court acted in mistaken reliance upon the opinion of Justice Brandeis in *Chicago Board of Trade v. United States,* 246 U.S. 231 (1918), when it concluded that it had the right to substitute for the jury's verdict its finding "of the role that the defendants' (sic) *intent or purpose* plays in the rule of reason test" (App. A53). The court totally ignored the fact that the Brandeis opinion was dealing with a district judge's refusal to consider the intent or purpose of the defendant, and in an antitrust injunction case where no jury was involved. This Court, then, was as able as the trial judge to determine the issue of reasonableness and did so on the record presented.

Now, in a different context, the Third Circuit has substituted its judgment for that of a jury after a full trial. The jury considered all the evidence as to the defendants' actions, as well as their claim of legitimate business purpose, and found that defendants' conduct constituted an unreasonable restraint. While the court of appeals was persuaded that Chrysler had impelling business reasons for seeking to improve its market position and for creating new dealerships to that end—a proposition we need not dispute—its opinion ignores the critical consideration that this objective neither required nor justified sharp and destructive discriminations against existing franchisees who had invested substantial capital in their representation of Chrysler.[1] As the district judge pointedly observed (App. 22), and as the jury doubtless found, the objective of increasing "Chrysler's competitiveness on the interbrand level" could

1. As the Court is aware, Congress has expressly recognized the substantiality of dealer investments in their franchises and the vulnerability of these dealers to coercion by automobile manufacturers. Automobile Dealer Franchise Act of 1956, 15 U.S.C. 1221 *et seq.* These interests are no less endangered where the dealer is forced out of business by economic measures adopted by the manufacturer than where there is a termination of the franchise in bad faith.

have been "effectively pursued had the financial and other assistance which the defendant provided DE dealers been extended to independent dealers as well." Such assistance was refused; beyond that, here as in other cases, as the district judge stated (App. A19), there was evidence "that the Chrysler-financed dealerships engaged in predatory practices to eliminate independent competitors . . ."

The Brandeis Court consistently recognized that in an antitrust case tried to the jury the evaluations of purpose and conduct and the inferences to be drawn therefrom are for the jury. Thus, in *Thomsen v. Cayser,* 243 U.S. 66 (1917), a court of appeals had entered judgment for the defendant N.O.V. on the basis of the defendant's good intentions, after a jury found that the defendant's actions restrained trade unreasonably. The Court said:

> "The argument that is employed *** is one that has been addressed to this court in all of the cases. *** It terminates, as it has always terminated, in the assertion that the particular combination involved promoted trade, did not restrain it, and that it was a beneficial, not a detrimental agency of commerce.
>
> "*** a combination is not excused because it was induced by good motives or produced good results ***." 243 U.S. 86.

See, also, in accord, *United States v. Topco Associates, Inc.,* 405 U.S. 596 (1972).

Plaintiff does not suggest sinister purpose or improper conduct on the part of the Third Circuit. It is the judgment, not the good intention, of the court which is in question. The judgment here follows a long line of cases where, for one reason or another, the Third Circuit, while iterating all the principles of law concerning illegal restrain of trade, has wiped out every large damage award in private antitrust actions.

Private antitrust actions are the cornerstone of effective antitrust enforcement. In the highly concentrated and indus-

trial area which the Third Circuit serves, fewer and fewer qualified counsel are willing to undertake the complex, time-consuming effort required to represent a single prospective plaintiff in a private antitrust action regardless of the merits of the plaintiff's cause. On the other hand, large corporate defendants have come to recognize that they need not alter predatory conduct, nor consider any compromise, for, regardless of the record below, history continues to comfort them with the likelihood of ultimate success on appeal.

Here, plaintiff and experienced counsel developed an unusually strong and detailed liability case, demonstrating in particular the predatory nature of defendants' activities with the defendants' own records and the testimony of the defendants' own witnesses, from the chief executives on down. Similarly, great care was taken to present the damage portion of plaintiff's case conservatively, by having existing records analyzed by a highly-qualified and national respected expert. Thereafter, a jury, whose actions in so doing were approved by an experienced trial judge, assessed the defendants with liability on the basis of such evidence. Now, however, the efforts of all have come to nought.

This case presents the Court with an important opportunity: (a) to approve the jury's condemnation of predatory trade practices used in many markets to increase the sales of large manufacturers at the expense of their own dealers; (b) to check a particularly important court of appeals in its prolonged frustration of enforcement of the antitrust laws by private damage actions, and (c) to reaffirm the congressional goals embodied in those statutes.

• • • •

I. The Factual Background

A. The Plaintiff.

The Plaintiff, Martin B. Glauser Dodge Co. ("Glauser Dodge"), is a New Jersey corporation which, between 1964

and 1970, sold and serviced new Dodge automobiles and trucks in Vineland, New Jersey, pursuant to a franchise agreement with Chrysler Motors Corporation. The stockholders of Glauser Dodge are the widow and four sons of its founder, all of whom worked in the business.

Vineland is a low density municipality located in Southern New Jersey, midway between Camden and the shore-points. Its trading area, according to a Chrysler appraisal, extends over the entire southern end of New Jersey into the Camden-Trenton area. This area, in turn, was part of what Chrysler denominated its "Philadelphia-Metro" region, which included the City of Philadelphia and counties surrounding it on both sides of the Delaware River.

B. Chrysler, Chrysler Motors, and Their DE Program.

The defendant Chrysler Corporation is a holding company which, through subsidiaries and divisions, manufactures, distributes, and sells motor vehicles. According to Chrysler's 1969 Annual Report to stockholders—that which immediately preceded the destruction of plaintiff's business in July of 1970 and the filing of this law suit the following month, the net sales of Chrysler Corporation and its consolidated subsidiaries for 1969 exceeded Seven Billion Dollars.

The defendant Chrysler Motors Corporation is a wholly owned subsidiary of Chrysler Corporation which manufactures and sells various brand name automobiles and trucks, including those with the brand name Dodge, through thousands of dealers with whom it has executed franchise agreements. From 1964, the year Glauser Dodge began business, until 1972, the sales of Chrysler Motors varied from between a low of 1.12 Billion Dollars to a high of a 2.49 Billion Dollars, and its annual profits, before taxes, averaged 16⅝ percent of the stockholders' investment.

In 1961, after Chrysler's share of the American automobile market had declined from 22 to 11 percent over a five year period and Chrysler Motors was using only 55 percent of its manufacturing capacity, Chrysler adopted a "Market

Representation Program" designed to improve its seriously deteriorating marketing strength to the point where Chrysler could bring its sales up to its then manufacturing capacity of 1.3 million units.

Pursuant to recommendations of a Chrysler executive memorialized in a so called "Quinn Memorandum", Chrysler determined that "venture capital" was required to revitalize Chrysler's dealership system, that most of this capital would have to be provided by Chrysler, and that use of the following devices, among others, was required:

(1) Mortgage on existing facilities;

(2) Sponsorship of capital loan program through financial companies, for which Chrysler would assume partial responsibility;

(3) Acquisition of existing facilities and lease to operator;

(4) Assumption of lease or guaranty of lease on existing facilities or facilities to be built; and

(5) Use of a contractual start-up plan in relation to the assumption of operating losses by Chrysler Corporation for a specified period,

"•••operator to be employed by wholly-owned subsidiary dealership corporation at salary plus incentive bonus expressed as percentage of profit before rent with option to buy shares at par•••."

The program by which Chrysler chose to carry out these objectives was known as the Dealer Enterprise ("DE") Program, and the subsidiary dealerships became known as DE dealers. Initially, Chrysler targeted 300 of 450 "open points"[2] to be filled by DE dealers; Chrysler also estimated that facility support in the order of $400,000 each would be required in 50 percent of these cases; that 75 percent of the

2. An "open point" is a location from which Chrysler desired to sell automobiles but at which it did not have a dealer.

new operations would be financed by Dealer Enterprise at an average cost of $100,000 each, and that launching costs—estimated to average $50,000 each—would be required with respect to 50 percent of the new dealerships "by utilization of the subsidiary company—option to purchase device."

The adoption and implementation of the Dealer Enterprise Program produced a dramatic improvement in Chrysler unit sales, operating results and earnings through 1968. The figures appear in columns 8 and 9 of a trial exhibit reproduced in the Appendix (at A5). These figures establish that, by 1964, the year Glauser Dodge commenced business, Chrysler's unit sales exceeded substantially its 1961 productive capacity of 1.3 million units, and that Chrysler's earnings had increased from 65 million to 291 million dollars. In its 1968 Annual Report to stockholders, Chrysler stated that, in that year, Chrysler had "•••fulfilled the objectives established when the greatest expansion program in (Chrysler) history was undertaken five years ago." In a deposition given in this case in 1971, Chrysler's president testified that Chrysler assembly plants had been working at capacity for a number of years prior to 1971.

Nevertheless, as the trial exhibit reproduced at p. A1 of the Appendix shows, Chrysler's Dealer Enterprise Program continued to operate after 1968, and on an expanded scale, even though, with the exception of an eleven month period in 1964 and during 1968, the program produced net operating losses for the years 1964 through 1970.[3] During

3. This schedule is also supplemented with information as to Chrysler's original investment—"Amount Required to Buy Out/Convert" and figures for a 14% return before taxes on such an investment which, according to plaintiff's economist, was what a competing private capital dealer would have earn in order to realize a return of only 8% of his investment. The "Amount Required to Buy Out/Convert" figures do not reflect that, in many cases, Chrysler's investment in the dealership increased from year to year by reason of additional sums which Chrysler Motors invested to make up for annual operating losses sustained by these dealers. Neither do the figures reflect the financial support which the dealers obtained from Chrysler Credit, Chrysler Financial and Chrysler Realty (see pages 12-14, *infra*.)

this same period, the number of dealerships subsidized by the program increased rapidly, as did the percentage of Dodge sales by DE dealers and those (usually former DE's) operating in Chrysler owned facilities. Specifically, these sales increased from 17.4 percent of all new Dodge sales in 1964 to 36.1 percent in 1970. The reason Chrysler increased its investment in the Dodge DE program notwithstanding the operating losses which it produced was that those losses were more than offset by increased profits at the manufacturing level generated by the lower unit cost of manufacturing which resulted from the better utilization of Chrysler's plant as sales increased.

The same loss pattern established by the national figures was reflected in the results of Dodge DE dealers in the Philadelphia-Metro region—including plaintiff's direct DE competitors, Crescent, Cherry Hill, Cinnaminson, and Black Horse Dodge (App. A2-A3) and in the results of the South Jersey Dodge DE dealers alone (App. A4). Chrysler figures also establish that between 1964 and 1972, sales of new Dodges by Dodge DE and former DE dealers in South Jersey increased from 20% to 42.5% of all sales of new Dodges in that area.

C. Chrysler Credit, Chrysler Financial, and Chrysler Realty.

The defendant Chrysler Financial Corporation is a wholly owned subsidiary of Chrysler Corporation and the capital source for the entire Chrysler financial complex. Admittedly, Chrysler Financial and its subsidiaries form a part of the marketing function of the sale and distribution of Chrysler automobiles. Chrysler Financial, in addition to obtaining money from its parent, acquires money from the public by selling commercial paper.

The defendant Chrysler Credit Corporation is a wholly-owned subsidiary of Chrysler Financial Corporation and provides wholesale credit to Chrysler dealers and retail credit to their customers.

During much of the period complained of, Chrysler Credit financed purchases of new Dodge automobiles from Chrysler Motors by the South Jersey DE dealers as well as Glauser Dodge; Chrysler Credit also purchased retail installment paper from Chrysler's private capital dealers such as Glauser Dodge, requiring them to guarantee such paper for 90 days after a default, whereas the competing DE dealers in Southern New Jersey could sell their retail paper to Chrysler Credit on a "without recourse basis", notwithstanding Chrysler Credit's loss of large sums on the resale of each repossessed vehicle.

Chrysler Motors made payments to Chrysler Financial in exchange for Chrysler Financial's support of Chrysler Motors DE program. These payments assured Chrysler Financial of earnings, which in turn made its notes attractive to outside investors.

As another trial exhibit (App. A5) establishes, Chrysler Credit and Chrysler Financial, exclusive of these subsidies, showed a steady deterioration in operating results from an initial profit of $184,000 in 1966 to a loss of $6,000,000 in 1970. The poor operating results and/or losses stemmed primarily from Chrysler Credit's purchase of retail installment paper from Chrysler dealers, including permitting DE's to be "out of trust"[4] for months at a time and purchasing installment paper from DE's on a without recourse basis. Notwithstanding, Chrysler's direct investments in its finance companies increased from $110 to $294 Million during the period in question (App. A5).

The defendant Chrysler Realty Corporation is a wholly-owned subsidiary of Chrysler Corporation formed in 1967. Chrysler Realty's primary responsibilities are to administer automotive properties, develop new dealer facilities, assist in upgrading existing facilities, and acquire sites for future dealerships.

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4. A dealer is "out of trust" when, having sold a vehicle financed for it by another pursuant to a trust agreement, it fails to repay the loan as soon as the financed vehicle is sold.

When Chrysler Realty was formed, Chrysler Motors transferred dealership assets which it already owned to Chrysler Realty in exchange for stock and notes. These notes bear interest at 6 percent even though, during much of the period involved in this case, Chrysler Corporation itself paid substantially more than 6 percent for the monies which it borrowed.

Chrysler Realty was formed as a device to obtain separate capital from the public—by selling notes—to subsidize Chrysler's DE program. Funds could be obtained in this way on terms superior to those on which a private capital dealer could ordinarily obtain funding for facilities. In order to assist Chrysler Realty Corporation in selling the public its notes, Chrysler Corporation guaranteed those notes.

A substantial portion of Chrysler Realty income is derived from rent received from the parent company for "dealer property under development". Other income is derived pursuant to an agreement under which Chrysler Motors pays "service fees" to Chrysler Realty while dealer property is under development. Additionally, in 1969-1970, Chrysler Realty received substantial capital contributions from its parent.

Chrysler Realty leased premises to DE dealers who competed with Glauser Dodge for sums equal to the interest which Chrysler Realty paid for the money which it borrowed to build the facilities, and this practice was continued when a DE dealer "bought out" but continued to occupy the premises as a Chrysler dealer. The "rent" did not cover items such as development costs, depreciation, profit, or amortization of underlying indebtedness, as would the rent of a privately capitalized dealer.

Another trial exhibit (App. A6) shows that, if the contributions from its parent corporation and Chrysler Motors were subtracted from the before-tax earnings of Chrysler Realty for the years through 1970, Chrysler Realty lost more and more every year and, most notably, lost $4,000,000 in 1972 alone. Nevertheless, as with Chrysler Financial, Chrysler's investment in Chrysler Realty increased each year. Also, the number of dealer facilities owned or leased by Chrysler Realty increased at the rate of 50 facilities per year from more than 500 in 1967 to more than 733 in 1972.

D. The General Effect of The DE Program On Dodge Dealers In South Jersey.

A Financial and General Fact Book of Chrysler Motors Corporation, published in July of 1968, stated:

> "Each year since 1962, Chrysler Corporation has gained a greater competitive share of the expanding automotive market in the United States. Unit sales have more than doubled during this period and in the first six months of 1968, the company's market share rose to 18.4 percent compared with 10.3 percent for 1962."
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> • • • • •
>
> "**** The conquest rate which is an indicator of the company's growth in obtaining new owners from among those who previously owned competitive makes has risen from 13 percent to 30 percent since 1962".[5]

As the figures (App. A4) show, the DE dealers in Southern New Jersey, collectively, operated at a loss until 1970, but their sales steadily increased. Low retail prices established by the DE dealers were among the keys to this sales success. In 1965 and 1966, Cherry Hill Dodge retailed new automobiles at prices ranging from their factory invoice prices to $50-$125 above. In August, 1966, at the instruction of a Dodge official, a Dodge DE dealer ran full page ads in *The Philadelphia Bulletin* advertising new Dodge automobiles at their factory invoice prices and inviting potential customers

5. The "conquest rate" is very important to an automobile manufacturer, since Chrysler statistics also show that in 1968 at least 75 percent of Dodge sales were repeat sales.

to inspect the factory invoices themselves. Approximately 196 Dodges were sold over one weekend as a result. This type of price-cutting and high-pressure advertising continued throughout Glauser Dodge's history. Chrysler records show that, in 1969, the average gross profit per new unit sold by Cherry Hill Dodge was $245, or $30 per unit under the group average against which Cherry Hill's sales were measured. That same year, the average gross profit per unit of Cinnaminson Dodge, another DE dealer, was $59 per unit below the average of its group. A third South Jersey DE dealer, Black Horse Dodge, was only $10 below its group average in 1969, and Black Horse made a profit that year; whereas the other two did not. In 1970, the year Glauser Dodge was put out of business, the average of the dealer group with which the results of Cherry Hill and Black Horse Dodge were compared went up—from $267 to $279, whereas Cherry Hill's gross profit per unit declined from $245 to $233, and Black Horse's margin dropped from $267 to $228. At the same time, Black Horse, which made $101,000 in 1969, lost $76,000 in 1970.

Another trial exhibit, which is the basis for the chart reproduced at App. A7, establishes that, during 1969 (when plaintiff's gross profit margins were still controlled by Chrysler Motors on the cost side and Cherry Hill Dodge and other DE dealers on the retail sales side), the maximum immediate [6] cash return above wholesale cost which Cherry Hill Dodge could have obtained for the sale of each new Dodge automobile was less than $61 per vehicle.

In addition to imposing on them unrealistic profit margins, many forms of discrimination by Chrysler against Dodge PC dealers were shown to have existed in the South Jersey area during the relevant period. For example, Chrysler Credit refused to purchase retail installment contracts from the customers of PC dealers, including Glauser, without recourse ("WOR") and required Glauser to underwrite (and

6. From time to time, dealers could increase their gross profit margins by earning bonuses in sales contents; they also received a "holdback" at year end from the manufacturer.

its shareholders to act as guarantors of) all retail installment contracts sold to Chrysler Credit. Each repossession produced a substantial loss and a constriction of Glauser's cash. Meanwhile, competitive DE's in the same market sold their retail installment contracts to Chrysler Credit without recourse even though, admittedly, Chrysler Credit used the same standards in evaluating all retail paper, and in disposing of the DE's repossessions, Chrysler Credit lost approximately $1,200 per vehicle.

Repossession losses were not the only damage directly resulting to Glauser Dodge from this discrimination. To ensure that Glauser would pay to repurchase its repossessions, Chrysler Credit withheld substantial sums of money—as much as $35,000 to $40,000 at times—in non-interest bearing reserves and refused to release these reserves even when they were desperately needed. The only reserves required of competing DE dealers were $1,000 each.

Other forms of discrimination established by the evidence are outlined *infra* (at pp. 22-23).

In 1964, there were private capital Dodge dealers at 33 points in Southern New Jersey; by 1972, there were no such dealers at 11 of these points; meanwhile, as noted before, the percentage of Dodge sales made by the DE Dodge dealers increased from 20 percent in 1964 to 42.5 percent in 1972. The proprietor of one of those other PC dealers was a witness for Glauser Dodge. He, too, testified that he could not compete because of limitations on his wholesale line of credit and demands for full recourse paper imposed by Chrysler Credit, sales by DE dealers at prices $50 to $75 over direct cost, and favoritism shown DE dealers in Chrysler advertising support.

E. Glauser Dodge Operations—February 1964, to May, 1969.

Glauser Dodge, from the standpoint of sales, was quite successful from its inception in February, 1964, until the fall of 1969, and it also earned modest profits. Although originally programmed by Chrysler to sell approximately 112 new

vehicles per year, Glauser Dodge continuously exceeded its minimum sales requirement by more than 200 percent—admittedly, a very unusual fact—and almost immediately became and remained the largest privately capitalized Dodge dealer in Southern New Jersey.

During this period, Glauser Dodge expanded its operations from one to three facilities and, in December, 1968, commenced construction of its own, new, consolidated facility. That facility was completed in September, 1969, at a cost to Glauser Dodge of $315,000, of which $260,000 was provided by a local bank on a loan participated in by the Small Business Administration and guaranteed by Mrs. Glauser, her four sons and the wives of the three who were married. In all, the Glauser family, using, among other things, the proceeds from insurance on the life of Martin Glauser, invested $25,000 in stock and $186,000 in loans to the dealership prior to May 1, 1969, and invested an additional $125,000 in the business subsequent to that date.

The esteem with which the management of Glauser Dodge was held during this period by Chrysler officials in the area is apparent from favorable comments made on this subject in a long series of Chrysler documents. Also, each and every step which the Glausers took to acquire the land for and build their new facility was cleared in advance and approved by local Chrysler officials.

When completed, Glauser Dodge's new facility was comparable to the elaborate show places which Chrysler Realty had provided for the three Dodge DE dealers then operated in Southern New Jersey, except that the Glauser facility cost less to build.

F. The Demise of Glauser Dodge May 1, 1969—July 3, 1970.[7]

As noted before (at pp. 10-11), the author of the Dealer Enterprise Program had suggested that, before establishing

7. One basis on which the court of appeals justified its decision was the assertion (App. A57) that there was no evidence that could

factory dealerships in a particular area, Chrysler should attempt to assist the private capital dealers there by alternatives such as the purchase and lease back to dealers of retail facilities, the guarantee of dealer leaseholds, and capital loans. Furthermore, the theory of the Dealer Enterprise Program was that, in time, such dealerships would produce enough earnings to permit the manager to buy out Chrysler, in which event, Chrysler would be free to use the funds recovered to invest in a similar dealership some place else.

When Glauser Dodge opened its large new facility in September, 1969, it was competing with three Dodge DE dealers in South Jersey[8] and through 1968, only one of these dealerships had ever operated at any profit (App. A4), and only one was selling substantially more new Dodges than was Glauser Dodge.

Chrysler's profits dropped $200 Million in 1969 and, during the summer and fall of 1969, these DE's intensified their advertising and price-cutting competition with Glauser Dodge. On 1970 Model Announcement Day, which coincided with the opening of Glauser's brand new facility, Chrysler Motors delivered Glauser Dodge no new Dodges, whereas each DE was amply supplied. At the same time, Chrysler Credit brought many more repossessions to Glauser Dodge for repurchase and demanded immediate repayment when vehicles subject to wholesale financing agreements were sold by Glauser. As a consequence of these pressures, Glauser Dodge lost sales and was confronted by cash flow shortages. Repeatedly, Glauser Dodge sought to obtain from Chrysler each of the types of dealer assistance which the Quinn Memo-

7. (Cont'd.)
have justified the jury in concluding that the defendants ever intended to put Glauser-Dodge out of business. That statement should be compared with the facts recited below.

8. Two of these DE dealerships were located within 25 to 40 minutes driving time of Glauser Dodge. All of the DE's advertised heavily, some in the same newspapers as Glauser Dodge. Glauser advertised on a radio station near Cherry Hill Dodge and Black Horse advertised heavily on a radio station whose beam was directed to and heard by residents in the vicinity of Vineland.

randum (pp. 10-11 *supra*) stated should be offered PC dealers, received recommendations from local Chrysler personnel that such relief be granted, but was turned down in Detroit. The final request for relief was rejected for the stated reason that Glauser Dodge was (and always had been, for that matter) selling three times as many cars as it was supposed to be selling in the area in which it did business.

Over the Fourth of July weekend in 1970, after one of the Dodge DE managers in South Jersey secured outside capital to buy control of his dealership in June, Chrysler Credit seized all of Glauser Dodge's inventory and sold it, privately, without proper notice, and at a very substantial loss, to a Chrysler DE dealer. This ended Glauser Dodge's business.

Thereafter, Chrysler Credit substantially increased the wholesale credit made available to all the competing DE dealers, a Chrysler executive purchased control of a nearby private capital dealership, the DE dealers immediately increased their sales in 1970 by approximately the same number of vehicles Glauser had sold in 1969, and the new PC dealer increased his sales, too.

On the other hand, Chrysler did not place a new dealer in Vineland for three years, *i.e.*, not until all the DE dealers had "bought out", even though, one month before Glauser's business was destroyed, Chrysler's district sales manager had written that Chrysler intended to have a Dodge dealer in Vineland for at least fifteen years.

II. The Proceedings Below.

A. The District Court.

This case was tried before Honorable Mitchell A. Cohen. Judge Cohen is and was the senior district judge in the State of New Jersey.

Plaintiff presented its case primarily through Chrysler records and ten Chrysler witnesses. The latter ranged from

the chief executive officers of the various Chrysler defendants to the Collection Supervisor in Chrysler Credit's Cherry Hill branch office. Three of Martin Glauser's sons and other witnesses also testified and produced the plaintiff's relevant records. Also, to compute plaintiff's damages, and to provide testimony concerning the unreasonableness of the defendant's marketing practices and their probable effect on private capital dealers, plaintiff presented Dr. Albert H. Kuehn. Dr. Kuehn is a nationally recognized economist and marketing expert who has served as a consultant to the Antitrust Division of the United States Department of Justice.

As originally filed, plaintiff's complaint included claims for attempting to monopolize the retail sale of Dodge automobiles and of price discrimination under the Robinson-Patman Act. However, since the evidence was largely duplicative and plaintiff's counsel desired to simplify the issues to the jury, they voluntarily proposed and agreed, at the conclusion of the evidence, to have dismissals entered as to all but the Sherman 1 claim, and stipulated to the amount of a Chrysler Credit counterclaim.

In his closing address to the jury, counsel for defendants argued, in effect, that the Chrysler defendants were constrained to do what they did because of interbrand retail competition from General Motors and Ford. Although there was absolutely no independent evidence to support this position, Judge Cohen instructed the jury to weigh Chrysler's contention:

> "In determining whether or not a particular combination or conspiracy did or did not restrain trade unreasonably, one of the factors you should consider is the business or economic reasons which may have motivated the defendants' course of action. However, if *after* considering this you nevertheless conclude that the effect of the defendants' action was to unreasonably restrain trade, then you should find that the combination or conspiracy was unlawful, and *in that event*, it would be no defense

that defendants' motives were good or that they thought they had good business reasons for doing what they did."

The jury decided specifically that the combination and/or conspiracy complained of unreasonably restrained trade (App. A13), and the damages award made by the jury was at the lower edge of the various damage projections offered by plaintiff's experts. While quite substantial, it did no more than put the Glauser family in a position to repay what was owed to Chrysler Credit, honor Glauser Dodge's other debts (including the one to the Small Business Administration), and recover their investment.

In his opinion denying Chrysler's post trial motions, Judge Cohen stated (App. A13):

> "The essence of plaintiff's antitrust claim is that the Dealer Enterprise marketing program operated in a discriminatory fashion vis a vis private capital dealers. There was evidence adduced at trial to show that: (1) Cars were advertised and sold through DE dealers at prices which were lower than private capital dealers, such as the plaintiff, could afford to charge. (2) Superior physical facilities were provided to DE dealers on terms which were not available to competing private capital dealers. (3) DE dealers were permitted to sell retail installment contracts to Chrysler Credit Corporation on a without recourse basis, whereas plaintiff was required to guarantee to repurchase defaulted retail installment contracts of its customers, (4) DE dealers were permitted to operate in an out-of-trust condition when experiencing cash flow problems, whereas plaintiff's credit was immediately revoked when it was out of trust. (5) Restrictions on plaintiff's wholesale lines of credit, as well as its inability to sell its commercial retail paper without recourse, precluded plaintiff from participating in revenue-producing sales contests to the same degree as DE dealers. (6) Plaintiff did not receive the new vehicles it had ordered for its 1969 opening, even though an ample number of such vehicles were delivered to the DE dealers in the Camden area."

Emphasizing in particular two prior decisions of the Court of Appeals for the Third Circuit and one district court decision of which that court had approved (see p. 35 *infra*), Judge Cohen held that the foregoing features of the defendants' DE program raised questions under the Act resolvable only by a jury (App. A18-A19).

In answer to the defendants' argument that they should be absolved from accountability because their purpose was to increase competition at a higher level, Judge Cohen pointed out, citing this Court's decision in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), that there was no justification for violating the Act in one particular market in order to further competition in a larger, more important market. He also said (App. A22):

> "In any event, defendants' desire to increase Chrysler's competitiveness on the interbrand level does not explain the reasonableness of their conduct. Indeed, this goal could have been more effectively pursued had the financial and other assistance which the defendants provided DE dealers been extended to independent dealers as well".

B. The Court of Appeals.

Before the court of appeals, this case was heard by Judges Gibbons, Weis and Garth, of whom only Judge Weis had participated in the earlier decisions of the court of appeals involving automobile dealerships cited in Judge Cohen's opinion. The panel conceded (App. A45-A47) that there was evidence of the price cutting and all of the discriminations which Judge Cohen held supported the jury's findings of a conspiracy or combination among the defendants which unreasonably restrained trade. However, the panel held (App. A56) that the defendants were entitled to judgment

N.O.V. because the evidence also showed that Chrysler had adopted the Dealer Enterprise Program for valid business purposes, *i.e.*, to increase retail sales and to strengthen its dealership system. The most recent Third Circuit decision cited by Judge Cohen, *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338 (1974), was distinguished on the ground that, while the case involved the same Dodge DE program of which plaintiff complained, that case was based on a complaint which included a specific charge that Chrysler intended, by its conduct, to achieve a Dodge sales structure composed primarily of large Chrysler-owned dealerships (App. A54). The panel also said (App. A57, A58, A60) that it could find no evidence in the record in this case that the actual effect of the Dodge DE program was forward vertical integration by Chrysler, or that the defendant ever actually intended to destroy Glauser Dodge.

Finally, the panel noted that (App. A58), to the extent Glauser Dodge claimed an injury based solely on subsidies which the DE dealers received but Glauser Dodge did not receive, Glauser Dodge's claim was foreclosed by another Third Circuit decision, *Rea v. Ford Motor Co.*, 497 F.2d 577, 590, *cert. denied*, 419 U.S. 868 (1974).

The specific ground on which the court of appeals based its entry of judgment, *i.e.* absence of vertical integration, had not been raised by the defendants at trial, in their post trial motions below, or even in their appellate briefs as a basis for directing a verdict or for entering a judgment N.O.V. Nor had such a theory for the entry of judgment been mentioned by anyone at oral argument on appeal. Accordingly, plaintiff sought rehearing by the panel and, in view of the panel's treatment of the court of appeals' earlier decisions in this area, rehearing before the full court. However, unless one member of the panel which hears a case votes for rehearing by the panel or a majority of the entire court votes for rehearing in banc, such petitions are denied.

That is what happened here.

REASONS FOR GRANTING THE WRIT.

I. In Entering Judgment for the Defendants N.O.V., the Court of Appeals Departed Significantly From Principles of Substantive Law Promulgated by This Court, and Interpreted the Antitrust Laws In a Manner Which, if the Decision Is Permitted to Stand, Will Have a Far Reaching and Very Adverse Effect on Private Enforcement of the Antitrust Laws in the Automobile and Many Other Oligopolistic Industries.

Chrysler Corporation is one of three huge manufacturers which dominate one of the nation's most important and most oligopolistic industries, the manufacture and sale of motor vehicles.[9]

9. *See* Note, *Vertical Integration In The Automobile Industry*, 17 B. C. Industrial and Com. L. R. 871-894 (1976). Among other things, the author points out (p. 875) that, between 1962 and 1968, "the Big Three's" aggregate share of the new vehicle registrations averaged 88.24% and that (p. 877), together, these manufacturers supply approximately 97% of the industry's domestic production. She also states, with annotations to supporting authority (at pp. 876-78):

> "***while a certain amount of concentration may be necessary to foster economic efficiency and progress, it has become increasingly clear that the Big Three have reached a level of concentration exceeding that which is required for optimum efficiency. Such excessive concentration is increasingly being regarded as harmful, rather than helpful, to competition. The Supreme Court, Congress and commentators have each indicated an awareness of the anticompetitive effects of high concentration.***
>
> An Oligopoly, which is broadly defined as a market controlled by a few manufacturers who impose high barriers to the entry of new competitors, is generally the result of intentional business conduct rather than purely fortuitous events.***
>
> The high degree of concentration that characterizes on oligopoly such as the automobile industry serves to destroy any actual competition among the few firms which comprise the oligopoly. High market concentration and entry barriers foster price fixing and other types of interdependent behavior. Specifically, high concentration undermines independent decisions by the firms with respect to prices and levels of production, thereby engendering a

Historically, as the court of appeals itself noted (App. A37-A38), retail sales in the automobile industry have been made by tens of thousands of independent dealers, but, more recently, the number of dealers has declined sharply, and manufacturers have assumed a greater and greater role in retail sales of their products by establishing factory controlled dealerships. In many areas, these dealers compete directly with privately capitalized dealers franchised by the manufacturer.

In the present case, a privately capitalized Dodge dealer has complained, and a jury has found as fact, that the dealer's business was damaged and ultimately destroyed by the actions of Chrysler and certain of its subsidiaries in establishing a group of factory controlled Dodge dealerships, causing these dealerships to establish retail price levels and gross profit margins at which privately capitalized dealers such as the plaintiff could not afford to compete, and using manufacturing profits generated by the increased sales produced as a consequence of these actions to subsidize the operations of the factory controlled dealers with a panoply of devices which the manufacturers did not offer to the competing private capital dealers.

The inevitable effect of these practices, as the record clearly shows, has been increasing forward integration of Chrysler into the retail sales market for Dodge automobiles

9. (Cont'd.)
disregard for price and product competition in favor of restricting production and inflated prices.

Measured by reference to the factors of concentration and barriers to entry, the automobile industry is one of the most anticompetitive industries in America; concentration is maintained at a level which is twice that considered repugnant to competition.***

A number of proposals have been advanced with respect to the manner in which the anticompetitive characteristics of the interbrand automobile market could be reached and regulated. ***One proposal which has particular significance for purposes of this discussion is that suit be brought under the Sherman Act to force the manufacturers to surrender their vertical control of the automobile distribution system. The theory underlying this third proposal is that an increase in the number of independent dealers selling a particular brand of automobiles in a given geographical area will increase competition at the interbrand retail level.***"

and the destruction of a substantial number of individual private Dodge dealerships in South Jersey alone.

Yet, in this case, the court of appeals has overturned the jury's verdict and judgment entered on the same by the very experienced judge who presided at the trial on the ground that the defendants' conduct was reasonable *as a matter of law* because the manufacturer intended as a consequence to increase its products' already quite significant share of the domestic motor vehicle market, and because *some* operators of factory controlled dealerships eventually bought the controlling stock in their dealerships and so, allegedly, became "independent". (Actually, the South Jersey DE managers who "bought out" continued to operate in Chrysler subsidized facilities under leases which will terminate if they cease selling Chrysler products; also Chrysler itself (App. A1) continues to classify such dealers as part of its Dealer Enterprise Program.)

Complete vertical integration in whatever share of the retail market for the sale of its products the manufacturer has an interest, and largely at the expense of the privately capitalized dealers, will be the inevitable effect of permitting the instant decision to stand. Furthermore, since the types of subsidies and factory support complained of here are not uncommon in other important industries, granting imprimatur as a matter of law to them will likely have the same effect there.

The principles of substantive and procedural law which the court of appeals chose to ignore in this case were previously thought to be well settled. In *Eastman Co. v. Southern Photo Co.*, 273 U.S. 359 (1927), the evidence showed that, after Eastman chose to commence distributing it products directly to customers who were, or had been, customers of its dealers, Eastman also refused to grant those dealers discounts as it had previously done. This Court held that a proper basis in fact existed for assessing Eastman with liability under the antitrust laws, and this notwithstanding the fact that Eastman professed to have valid business reasons for its conduct. The Court also held (273 U.S. at 375) that

whether or not liability should be assessed in such a case was "***exclusively a question for the jury; its determination is conclusive upon this question of fact."

In *Poller v. Columbia Broadcasting System,* 368 U.S. 464 (1962), this Court considered the antitrust issues implicit in the following situation: the plaintiff operated a UHF television station in Milwaukee which originally was affiliated with the Columbia Broadcasting System. Then CBS acquired another UHF station in Milwaukee and cancelled its affiliation with plaintiff. At this point, plaintiff's business became unprofitable, and when its assets were liquidated, the purchaser, at a distress price, was the plaintiff's CBS-owned competitor. The lower courts entered and affirmed summary judgment for the defendant on plaintiff's antitrust claim, primarily because they concluded that there was no evidence that the public had been injured as a result of the defendant's conduct. This Court reversed, saying (369 U.S. at 473):

> "To the extent that this argument suggests that there is no violation of the antitrust laws because the public will still receive the same service, it has been foreclosed by this court's decision in *Klor's v. Broadway Hale Stores,* 359 U.S. 207 (1959)."

The Court also emphasized (368 U.S. at 473) that, in cases such as this, "***where motive and intent play leading roles, the proof is largely in the hands of the alleged competitors, and hostile witnesses thicken the plot ***(there) is no substitute for trial by jury which so long has been the hallmark of even handed justice."

The specific factual conduct of which Glauser Dodge complained is not identical to that complained of by the plaintiffs in cases such as *Eastman, Poller,* and *Klor's,* but the legal principles involved are precisely the same. Although those cases involved charges of monopoly or attempted monopoly, the jury in the present case had the right to find that the defendants had combined or conspired in ways which produced a monopolistic effect, since an agreement to monopolize or to

attempt to do so is, *ipso facto,* an agreement to restrain trade unreasonably. It was for this reason that, as plaintiff's counsel, we decided to have the Section 1 claim alone submitted to the jury.

Furthermore, the conduct and business consequences disapproved by the jury here are very similar to those which Chief Justice (then Circuit Judge) Burger condemned in *Reynolds Metal Company v. F.T.C.,* 309 F.2d 223 (D.C. Cir. 1962). Judge Burger sustained an F.T.C. order directing Reynolds Metal Company to divest itself of one of eight converters of "jumbo" aluminum foil produced by Reynolds and converted by its customers into florist foil. The cost of the "jumbo" foil was 70 percent of the cost to the converters. The converter acquired by Reynolds had 33% of the florist foil retail sales market, and its seven competitors shared the balance. Judge Burger stated that the anticompetitive effect of the Reynolds acquisition was "obvious" (309 F.2d 229-230), adding:

> "***Arrow's assimilation into Reynolds enormous capital structure gave Arrow an immediate advantage over its competitors***. The power of the 'deep pocket' or 'rich parent' for one of the foil suppliers in a competitive group where previously no company was very large and all were relatively small opened the possibility of power to sell at prices approximating cost or below and thus to undercut and ravage the less affluent competition.***"

The evidence in the present case shows that the Dodge DE program was regularly operated at a loss nationally, regionally and in the very market in which the plaintiff was obliged to compete; at the same time, Chrysler, over a seven year period, acquired direct or indirect control of 36% of new Dodge sales nationally and 42.5% of such sales in Southern New Jersey. These percentages are substantially higher than those branded as dangerously anticompetitive in *Reynolds,* and Chrysler's actual and multiple abuses of the "deep pocket" to achieve such penetration are equally well documented.

The decision of the court of appeals in the present case is also inconsistent with the interpretation placed upon the antitrust laws in this area by other courts of appeals.

Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336 (9th Cir. 1970), involved an action by a distributor of sealants against the manufacturer of the dominant line of products in that market. That manufacturer, like Eastman Kodak, began to bypass the plaintiff and sell directly to plaintiff's customers at the same or lower prices than it sold to its distributor. Plaintiff sued, charging violations of Sections 1 and 2 of the Sherman Act and also of the Robinson-Patman Act. Citing the alleged absence of any public injury, the district court granted summary judgment. The Court of Appeals for the Ninth Circuit reversed, stating (at p. 1342):

> "•••the affidavits•••would sustain the cause of action for conspiracy. The restraint of trade is the effect on competition in Presstite products which are admittedly the dominant line of products. First, the general public is damaged by being deprived of an independent distributor, who may handle competing products, thus giving the customer a ready comparison and a less biased assessment of each product. Second, an elimination of the major independent distributor would give Presstite even more power to control prices including those charged by the few remaining small distributors."

See also *Southern Blowpipe & Roofing Co. v. Chattanooga Gas Co.*, 360 F.2d 79 (6th Cir. 1966), *cert. denied*, 393 U.S. 844 (1976). There, independent sellers and installers of gas equipment and appliances sued a public utility, complaining that the latter had violated the antitrust laws by selling and installing gas appliances to consumers at or below cost. The utility claimed that it made a profit on 90% of its sales, "aside from promotional expenses," and, in any event, was attempting by its conduct to increase the number of gas users in competition with TVA, which was encouraging the public

to use electric power. The district court entered summary judgment for the defendant, but the Court of Appeals for the Sixth Circuit reversed, holding that the case presented questions under the antitrust laws for resolution by a jury. Thereafter, this Court denied certiorari.

Finally, the *Glauser* decision is directly inconsistent with six opinions of the Court of Appeals for the Third Circuit and the district courts of that Circuit in other cases involving complaints by private capital dealers against automobile manufacturers arising from the operations of factory-controlled dealers. Those cases, however, are discussed in the next section, where we believe they have greater significance.

II. This Decision Is Indicative of a Long Standing Aversion of the Court of Appeals For the Third Circuit to Private Enforcement of the Antitrust Laws.

The antitrust laws represent a long standing and highly significant statement of government policy by the people of the United States and English-speaking peoples generally.[10] Furthermore, where in the past a ruling by a court of appeals "••• seems to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States," this Court has granted certiorari. *Perma Life Mufflers, Inc. v. Intern'l Parts Corp.*, 392 U.S. 134, 136 (1968).[11]

The present importance of private actions to the effective enforcement of the antitrust laws is apparent from the sta-

10. See *Mitchell v. Reynolds*, 88 Eng. Rep. 610 (1712) and *Nordenfelt v. Nordenfelt Co.*, (1894) A. C. See also Stickells, Legal Control of Business Practices 12-13 (1965); *Orbo Theatre Corp. v. Loew's Inc.* 156 F. Supp. 770-774 (D. D. C. 1957), *aff'd*, 261 F. 2d. 380 (D. C. Cir. 1958), *cert. denied*. 359 U. S. 943 (1959), and *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 282 (6th Cir. 1898) *aff'd*. 175 U. S. 211 (1899).

11. See also *Klor's Inc. v. Broadway Hale Stores, Inc.*, 359 U. S. 207 and 705 (1959), in which the Solicitor General of the United States supported the grant of certiorari on a petition filed on behalf of a small retail appliance store; the Solicitor General also supported reversal on the merits.

tistics on pages 99-100 and A20-24 of the 1977 Annual Report of the Administrative Office of the United States Courts. For the statistical year 1977, of 1689 civil and criminal antitrust cases commenced, 1611 were private cases. For the statistical year 1976, of 1574 civil and criminal antitrust cases commenced, 1504 were private cases. At the year end, 1977, there were 3029 private antitrust cases pending and untried in the district courts, as contrasted with 113 cases to which the United States was a party. Furthermore, a review of the Administrator's 1977 year end printout shows that 82 private antitrust cases pendings at that time involved manufacturers of motor vehicles, and that these included 18 cases in which Chrysler Corporation was named as a defendant, 11 cases naming General Motors and 9 cases naming Ford.

The Administrator's 1977 Report (at pp. 99-100) also states that, of all private antitrust cases filed during the court year and pending at year end, one-third were filed or pending in five district courts, one of them (in Philadelphia) under the jurisdiction of the Court of Appeals for the Third Circuit, whose decision we ask be reviewed here.

Finally, a review of the decisions of that court in the antitrust field over the past fifteen years establishes that, notwithstanding the existence of not infrequent instances in which that court has reversed summary judgments in favor of defendants on the ground that a trial of the merits was required, not a single dollar verdict in favor of an antitrust plaintiff has remained unscathed; all have been set aside, reduced substantially, or been the victims of judgments N.O.V.

Specifically, in *Mt. Lebanon Motors, Inc. v. Chrysler Corporation,* 417 F.2d 622 (1969), a jury concluded that Chrysler violated Section 1 of the Act in administering its factory-controlled dealer program in Pittsburgh, but declined to award plaintiff damages. The court of appeals affirmed. In *Rea v. Ford Motor Company,* 497 F.2d 577 (1974), *supra,* the court of appeals entered judgment for the defendant N.O.V. after a jury awarded plaintiff $3,350,000. In *DeFilippo v. Ford Motor Company,* 516 F.2d 1313 (1975), the

court of appeals entered judgment for the defendant N.O.V. after a plaintiff recovered judgment for $2,240,000 plus attorneys fees of $384,000. In *American Motors Inns v. Holiday Inns Inc.,* 521 F.2d 1230 (1975), the court of appeals, while agreeing that the record supported a district court judgment to the effect that one type of conduct engaged in by the defendant violated the Act, set aside a stipulated damage award of $4,000,000 plus attorneys' fees and costs on the ground that a new trial was required with respect to another type of conduct on which the judgment was based. In *NBO Industries Treadway Companies, Inc. v. Brunswick Corp.,* 523 F.2d 262 (1975), the court of appeals awarded a new trial after plaintiff recovered a judgment of $7,074,000. Thereafter, this Court granted certiorari and entered judgment for the defendant N.O.V., *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 97 S.Ct. 690 (1977). In *Coleman Motor Co. v. Chrysler Corp.,* 525 F.2d 1338 (1975), the court of appeals set aside a judgment of $900,000 and directed a new trial as to both liability and damages. In *Baughman v. Cooper-Jarrett, Inc.,* 530 F.2d 529 (1976), the court of appeals affirmed a trial court in reducing a plaintiff's antitrust award from $60,000 trebled, to $30,600, trebled. In *Pitchford v. Pepi, Inc.,* 531 F.2d 92, *cert. denied,* 96 S.Ct. 2649 (1976), the court of appeals set aside a judgment of $1,475,000 plus counsel fees and directed a new trial as to damages and an additional hearing with respect to the fees of plaintiff's counsel. In *Martin B. Glauser Dodge Co. v. Chrysler Corporation, et al,* — F.2d — (1977), the present case, the court of appeals entered judgment for the defendant after plaintiff secured a judgment for $3,900,000 plus counsel fees; in the same opinion (App. A36), the court expressed sentiments indicating its approval of a district court decision, as yet unreported, entering judgment N.O.V. for the defendant in the case of a dealer complaining of the actions of Chrysler's factory-controlled dealers in Philadelphia. *Elfman Motors, Inc. v. Chrysler Corp.,* No. 72-12802 (E.D. Pa. August 9, 1977).

During the same period, the court of appeals rendered several other decisions of significance here. In *Three Rivers Motor Company v. Ford Motor Company,* 522 F. 2d 885 (1975), the court accepted an interlocutory appeal and dismissed a dealer's antitrust action against Ford for the reason that, when the dealer surrendered his franchise, he executed a release of all claims against Ford. The execution of such a release is required before a manufacturer will purchase at cost a liquidating dealer's inventory of unused parts, accessories and equipment.[12] In *Three Rivers,* the court of appeals enforced the release notwithstanding a claim that it was executed under economic duress. The court rejected that contention on the ground that the plaintiff was advised by counsel at the time the release was executed and, allegedly, that fact alone barred the defense of economic duress under Pennsylvania law. In this connection, the court failed to follow the most recent Pennsylvania appellate case on the subject, *Bernard Litten v. Jonathan Logan,* 220 Pa. Superior Ct. 274, 286 A. 2d 913 (1975), in which the Pennsylvania court held to the contrary and refused to follow an earlier decision on which the Court of Appeals chose to rely in *Three Rivers.*

In *Lindy Bros. Builders, Inc. v. Phila. v. Am. Radiator & Sanitary Corp.,* 487 F. 2d 161 (1973), the court of appeals severely limited the method by which counsel fees would be computed for attorneys who succeeded in effecting a settlement on behalf of a class of antitrust claimants, and in *Merola v. Atlantic Richfield Company,* 494 F. 2d 292 (1974), the court held that the *Lindy* standards would apply even in instances where a contingent fee agreement purported to define the fee which the plaintiff would pay its counsel in the event his efforts were successful.

In the present case, the court of appeals set aside a jury's findings and entered judgments for the defendants N.O.V. even though (a) this case was competently tried

12. Glauser Dodge's refusal to execute such a release caused it to sustain a loss of $30,000 on the liquidation of its inventory.

by experienced counsel; (b) before the senior district judge in New Jersey; (c) factually, the jury's verdict was based primarily on the testimony of Chrysler witnesses and Chrysler documents; (d) the verdict was also supported by the opinions of a well known and highly qualified expert who has been consulted on occasion by the Antitrust Division of the United States Department of Justice; (e) on the law, the verdict was supported not only by the opinion of the distinguished district judge, but by comments adverse to the propriety under the antitrust laws of the very marketing system complained of in opinions rendered by a majority of the judges in this court of appeals and by five district judges within its jurisdiction.

Let us review those cases.

In *Mt. Lebanon Motors, Inc. v. Chrysler Corp.,* 283 F. Supp. 453 (1968), the District Court for the Western District of Pennsylvania considered the same Dodge DE dealer system which was the object of plaintiff's complaint in the present case. Citing in particular now Chief Justice Burger's decision in *Reynolds Metal Co. v. F.T.C.,* 309 F. 2d 233 (1962), *supra,* that court stated of Chrysler's practices (at p. 457):

> "***there were arguable antitrust questions with respect to whether the degree of forward integration being practiced by the manufacturer in competing with its own customers was permissible or impermissible, and whether the manner in which such competition was carried on constituted by price cutting to eliminate competition, with losses being subsidized by adventitious advantages unrelated to the competitive merits of the respective contestants in the particular market."

In *Rea v. Ford Motor Co.,* 355 F. Supp. 842 (W.D. Pa. 1973), another district judge in Pittsburgh entered judgment on a jury verdict adverse to Ford Motor Company in a case involving the implementation of its manufacturer—financed dealer program, stating (at p. 865):

> "Ford Motor Company, by operating factory stores and dealer development stores which were under its domination, was in competition with its own dealers. Therefore, when it adopted a course of action in combination with such stores to drive any of these independent dealers out of business or to dominate the market, it was certainly engaged in a combination or conspiracy in restraint of trade under the Sherman Act. See *United States v. McKesson and Robbins, Inc.*, 351 U.S. 305 (1956)."

The Court of Appeals for the Third Circuit set aside the *Rea* verdict on other grounds, but it did not disturb the above analysis; rather, the court stated specifically that its "decision *** in no way undermines the proposition that automobile manufacturers are subject to the strictures of the antitrust laws in the operation of their wholly owned outlets." *Rea v. Ford Motor Co., supra,* 497 F. 2d at 590.

In *Coleman Motor Co. v. Chrysler Corp.*, 525 F. 2d 1338 (1975), the Court of Appeals for the Third Circuit reviewed some of the features of the Dodge DE program attacked in *Mt. Lebanon Motors* and in the present case and concluded, once again, as had a third district judge in the court below (376 F. Supp. 546 (W.D. Pa. 1974)), that a proper basis in fact and law existed for a jury's determination that two of the defendants in the present case had combined and conspired with managers of factory controlled dealerships in Pittsburgh and had been guilty of predatory conduct in violation of Section 1 of the Sherman Act by causing or permitting those dealerships to operate at a loss, subsidizing those losses, subsidizing advertising expenses, and then, after plaintiff's competing private capital dealership was destroyed, reducing advertising expenses.[13]

Plaintiff's evidence in the present case was far more extensive and detailed than that tendered in *Mt. Lebanon, Rea*

13. The Court of Appeals said (525 F. 2d. 1348): "***If Chrysler deemed additional dealerships necessary for effective competition with other manufacturers, it was free to establish them on non-discriminatory terms."

and *Coleman;* furthermore, the evidence here pertained also to the operations of three sister subsidiaries, Chrysler Financial Corporation, Chrysler Credit Corporation, and Chrysler Realty Corporation and a large group of factory-controlled dealerships in metropolitan Philadelphia and South Jersey. Thus, the Third Circuit's decision of November 14, 1977, acquitted of culpability, as a matter of law, the very same system and practices which, on three previous occasions, that court had ruled, as a matter of law, were a proper subject for jury determination of antitrust liability, and which the jury in this case had specifically determined did restrain trade unreasonably.

Significant, too, of the attitude of the Court of Appeals for the Third Circuit in these cases is the fact that the justification given by the court for entering judgment, namely, that there was no evidence here of forward integration nor proof that Chrysler and its subsidiaries ever intended to destroy Glauser Dodge, was so far fetched that not even the very well counseled defendants had moved for a directed verdict, sought judgment N.O.V. in the trial court, or briefed or argued on appeal on any such grounds. *Cf.* Fed. R. Civ. P. 50 (a) and (b) and the decisions interpreting those provisions collated in 5A *Moore's Federal Practice* 50-50, fn. 5.

Most significant of all in this connection is the fact that the errors and evidentiary distortions in the Third Circuit's opinion were clear and included the following:

(a) The opinion erred in stating that there was no evidence that the conduct complained of by the plaintiff resulted in "forward vertical integration" (App. A57), *i.e.*, concentrating sales of Dodge products in the hands of Chrysler-controlled dealerships (App. A57). Plaintiff's highly qualified economist and antitrust expert, Dr. Kuehn, testified, in answer to hypothetical questions based on the evidence with respect to the operating results of Dodge DE dealers nationally and locally, as well as the operating results of Chrysler Credit and Chrysler Realty, that private capital dealers obliged to compete with Dodge DE

dealers subsidized by Chrysler Motors, Chrysler Credit and Chrysler Realty would have a very difficult time doing so. Glauser Dodge produced detailed evidence (see pp. 15-20, *supra*) with respect to the effects of the combined actions of the Chrysler defendants and their factory dealers on its business and those of other private capital dealers. That evidence included testimony by the principal of another South Jersey Dodge private capital dealer whose business was destroyed by the same conspiracy during the same period as plaintiffs. Also "overlooked" in the court of appeals' opinion was evidence that, as of 1969, there were four private dealers in the City of Philadelphia, but by the time of trial, there were only two private capital dealers left.[14] Evidence also showed that, in 1964, there were private capital Dodge dealers at 33 points in Southern New Jersey, but by 1972, eleven of these points were open; meanwhile, the percentage of South Jersey sales made by the Dodge DE dealers of former Dodge DE dealers operating in Chrysler-subsidized facilities had increased from 20 percent in 1964 (there was none prior to 1973) to 42.5 percent in 1972.

(b) the court of appeals' opinion incorrectly states (App. A57) that there was no evidence which would have justified a jury in concluding that the defendants ever intended to put Glauser Dodge out of business. Clearly, however, the proof sustained a contrary conclusion. *See*, in this connection, the facts summarized at pp. 18-20 *supra*. *Cf.* the facts in *Eastman Co. v. Southern Photo Co.* and *Poller v. Columbia Broadcasting Systems*, discussed at pages 27-28, *supra*.

(c) The court of appeals attempted to distinguish this case from its own decision in *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338 (1975), *supra*, by stating that the *Coleman* complaint charged the Chrysler defendants with

14. Notwithstanding that, the court did consider post-complaint evidence which was favorable to the defendants (App. A43).

attempting to monopolize a retail Dodge market and implying that the *Glauser* complaint included no such allegations (App. A54). This is not so.

(d) The court of appeals cited (App. A56) *England v. Chrysler*, 493 F.2d 269 (9th Cir. 1974), for the proposition that the plaintiff in a case such as this must prove that the defendant's conduct "was deliberate". This Court held to the contrary in *United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 375 (1967), and the court of appeals had so noted in *Coleman* (525 F.2d 1345, fn. 10). Also, a comparison of the facts in *England* with plaintiff's evidence here establishes that the cases are clearly distinguishable on their facts. However, even if the statements made in *England* were correct, imposition of that standard poses no problem for Glauser Dodge. All of the acts complained of by Glauser Dodge were deliberate, and the charts reflecting the results, nationally and locally, of the DE Program and of Chrysler Financial and Chrysler Realty, viewed in the context of the Quinn Memorandum, reflect a deliberate course of action. All of the discriminations of which the plaintiff here complained were deliberate. Furthermore, Chrysler's Dealer Trend Records showed very clearly that Chrysler management was always aware of the effects the pricing and advertising programs of its dealers were having on competing private capital dealers. Finally, even in *England*, the court stated, citing *Rea*, *supra*, "It may well be that the predominant emphasis on market penetration, which results in the deliberately reckless operation of a subsidized dealer and which has the inevitable effect of forcing competing and non-subsidized dealers to function at an unprofitable level, could, if proved, constitute an unreasonable restraint of trade" (493 F.2d at 273).

(e) The court of appeals' opinion suggests (App. A59) that Glauser Dodge would have had no cause for complaint if the DE dealers had obtained the type of discriminatory support of which plaintiff complains from sources not affiliated with Chrysler. This suggestion is a non-sequitur, because the evidence shows that Chrysler supported its fac-

tory dealers in this manner because private sources would not do so (App. A40).

(f) The court of appeals attempted to justify Chrysler's conduct while Glauser Dodge was in business by reciting circumstances which did not exist during that period. For example, as evidence of the alleged success of the DE program in establishing new dealerships, the Court referred to what happened to the South Jersey DE's *between 1972 and 1974*, years after Glauser's business had been destroyed (App. A43). More important still, the court described at some length the background of the Dealer Enterprise Program as conceived by its author *in 1961* (App. A36-A40). The court failed to perceive that the conduct complained of by Glauser Dodge took place *in 1964 and thereafter;* that the great bulk of plaintiff's damages resulted from the defendants' actions in 1969-1970; and that Chrysler's unused manufacturing capacity and diminished profits which produced the DE program in 1961 no longer existed in later years. Specifically, in 1961, when the DE program was devised pursuant to the Quinn Memorandum cited by the panel, Chrysler's unit sales were 892,000 [15] its productive capacity was 1.3 million units, and its profits were $65 Million. Thereafter, unit sales increased consistently to 2,263,000 in 1968 and earnings increased to $291 Million in that year (App. A5). Accordingly, there was never a time while Glauser was in business when Chrysler could justify its DE program on the basis cited by the Court of Appeals.

(g) The court of appeals (App. A43, A55) erred in its statements with respect to the results, as distinguished from the stated purpose, of the DE program. Through 1970, only 122 out of 508 Dodge DE dealers bought out, while 131 DE dealers were liquidated. Furthermore, contrary to several statements in the opinion (App. 43), *there was no evidence whatever that profits derived from any*

15. The Court of Appeals opinion (App. A39) states that Chrysler's unit sales in 1961 were 311,899; actually, that was the figure for the first six months of 1961.

DE dealership were ever sufficient to permit a DE manager to buy out Chrysler by repaying Chrysler for its entire investment. Specific evidence establishes, contrary to a statement in the opinion (App. A43), that none of the DE managers in New Jersey with whom Glauser competed ever succeeded in doing this. There was evidence that, in the four years *after* Glauser was put out of business and its share of the market absorbed by competing DE dealers, the managers of each of those three dealerships did buy the stock in their dealerships, *but not out of profits.* The evidence also showed that these dealers still operated in Chrysler-subsidized facilities under leases conditioned on their remaining Dodge dealers.

The jury could also have concluded from the evidence that Chrysler's plan was to use such dealerships to drive down the retail price of the Dodge automobiles in a particular area, and thereby make "conquest sales" to customers who previously had purchased products of other manufacturers. Once such sales were made—at the expense of operating losses or minimal profits by the factory-controlled dealers, Chrysler Realty, Chrysler Financial, and Chrysler Credit, as well as the private capital dealers, Chrysler wished to withdraw *direct involvement* in the marketplace to avoid antitrust consequences, secure in the knowledge that Dodge enjoyed a "loyalty rate" (repeat sales) of 50 to 75 percent. Chrysler recouped retail level losses on the conquest sales because increased production lowered unit costs. But private dealers such as Glauser Dodge could not benefit from this alternative source of profits. The statistics showed that, ultimately and as a consequence, and as Dr. Kuehn predicted, the private dealers who survived did so only with much lower profits, and were eventually destroyed.

(h) The court of appeals recognized, though it materially understated (*Cf.* App. A46-A47 and pages 15-20 *supra*), the defendants' discriminations against Glauser Dodge and in favor of the competing DE dealers, but erred in implying (App. A47) that such discriminations were contemplated by the Quinn Memorandum. On the contrary, both

the Quinn Memorandum and Chrysler's chief executive stated that it was always contemplated (as dictated by antitrust law precedents such as those cited in this Petition) that the various Chrysler subsidiaries would *not* discriminate in favor of factory-controlled stores at the expense of competing private capital dealers.

(i) Here, there was ample evidence that the Chrysler defendants abused their "deep pockets" and that plaintiff was injured as a direct consequence. *Cf Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690, 698 (1977), *rev'g.* 523 F. 2d 262, 273 (3rd Cir. 1975). The court of appeals refers to, but errs in characterizing as "start-up losses" (App. A47), the losses for the various DE dealers in Southern New Jersey and Philadelphia absorbed by the Chrysler defendants. Quinn had suggested that "launching costs of $50,000 each might be required for 50 percent" of the DE dealers. Compare that with the national, regional, and South Jersey figures for Dodge DE dealers shown in the schedules printed in the Appendix (at A1 to A5). Certainly, these figures justified the jury's conclusions that the repeated losses of the DE dealers in that region, which were in most instances covered at once by Chrysler Motors' new capital contributions, were not these figures are not truly representative of the losses which the Chrysler coterie sustained in that connection, because they do not reflect the loss of income on additions to the original capital made by Chrysler to cover previous years' losses, nor do they reflect other subsidies which the DE dealers received from other Chrysler defendants.

Even more shocking are the loss figures pertaining to Chrysler Financial Corporation and Chrysler Realty Corporation (App. A5-A6).

(j) The court of appeals understated materially plaintiff's evidence with respect to the nature and extent of the price-cutting engaged in by the DE dealers with which Glauser Dodge competed. Compare App. (A47) with the facts set forth on pages 15 and 16 of this petition.

(k) Finally, it must be noted, each and every error or oversight on the part of the particular panel which heard this case was called to the attention of the entire court of appeals by a timely petition for rehearing. Nevertheless, that court rejected the petition without even requiring the defendants to answer.

Obviously, this attitude of the court is severely limiting effective enforcement of the antitrust laws in an industry and in a region where effective enforcement must be a priority item.

III. The Court of Appeals Erred In Reviewing Plaintiff's Evidence as to Damages and In a Manner Which, if Not Corrected, Is Likely to Have Substantial Significance In Many Cases of This Kind.

This point is a cautionary one, dealing with an issue of damages which the court of appeals alluded to peripherally in entering judgment for the defendants. We discuss it very briefly only because it may have relevance if the Court determines to reverse the court of appeals but questions whether it should do so outright or remand for that court's consideration of other issues.

Of the damages sought by Glauser Dodge, approximately $320,000 consisted of subsidies, computed in terms of vehicle sales, which plaintiff did not receive but which the evidence showed were received by the DE dealerships with which plaintiff competed. These subsidies were computed by plaintiff's expert, Dr. Kuehn, who also testified, in answer to hypothetical questions, that they constituted a proper and conservative method of estimating the losses which plaintiff sustained in this area.[16]

16. The remaining elements in plaintiff's damage claim consisted of the dimunition in the value of its single purpose real estate facility as a result of destruction of its business, which dimunition was stipulated to be $336,000; a diminution in the value of plaintiff's inventory resulting from the destruction of its business, which the uncontradicted evidence established to be $30,000; $225,000 in losses from repossessions, interest lost on reserves for repossessions, and interest paid on

In one of the prior cases in this field, *Rea v. Ford Motor Co.*, 497 F. 2d 577 (1974), *supra*, the Court of Appeals entered judgment N.O.V. after a Ford dealer recovered a verdict under the antitrust laws against Ford Motor Company, on the ground that the plaintiff's proof of damages consisted solely of proof of subsidies which Ford Motor Company paid its factory owned dealer and the plaintiff's counsel deliberately refrained from producing proof of whether or to what extent plaintiff was actually injured as a result of such subsidies.

In the present case, however, as Judge Cohen noted in his opinion (App. A25-A26), Glauser Dodge offered proof that its prices were controlled by the DE dealers. Accordingly, a conservative method of approximating the damages which Glauser Dodge sustained as a result of the subsidies was to award plaintiff sums which, on a per car sold basis, equalled the subsidies which the evidence showed the competing DEs received from Chrysler. As the trial court noted (App. A26), "Glauser's profit margin was decreased to the extent its competitors were illegally favored." Notwithstanding, without discussion or explanation, the court of appeals stated (App. A59): "To the extent that Glauser Dodge claims an injury based solely on the loss subsidy theory, its claim is clearly foreclosed by our decision in *Rea v. Ford Motor Co.*, ***".

Rea, then, is clearly distinguishable on its facts from the present case. On the other hand, Judge Cohen's approval of the damage award here was squarely in accord with this Court's holdings in *Hanover Shoes v. United States Machinery Corp.*, 392 U.S. 481, 489 (1968), and *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947).

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16. (Cont'd.)
short term borrowings, from all of which the uncontradicted evidence showed that Chrysler Credit relieved the competing DE dealers; and the destruction of plaintiff's business as a going concern, as to which estimates were produced ranging from $340,000 to $905,000, and the jury awarded approximately $420,000.

Since damages attributable to subsidies paid factory controlled competitors are a vital part of the recovery sought in cases such as this—of which the Court Administrators's records show that a substantial number, and in the auto industry alone, are now pending. This, too, is an important question of federal law which should be correctly answered by this Court.

CONCLUSION.

For the reasons stated above, this petition for certiorari should be granted.

Respectfully submitted,

RALPH S. SPRITZER,
3400 Chestnut Street,
Philadelphia, Pa. 19104

Of Counsel.

TOM P. MONTEVERDE,
MORRIS L. CHUCAS,
MAX L. LIEBERMAN,
PELINO, WASSERSTROM,
CHUCAS & MONTEVERDE,
2300 Packard Building,
Philadelphia, Pa. 19102
(215) 665-8550

Attorneys for Petitioner.

STATUTORY APPENDIX.

This case involves §1 of the Sherman Antitrust Act, 26 Stat. 209 as amended by 50 Stat. 693 and 69 Stat. 282, 15 U.S.C. §1, and §4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. §15, which provide in pertinent part:

Sherman Antitrust Act

§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal ***."

Clayton Act

§15. Suits by persons injured; amount of recovery

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1275

MARTIN B. GLAUSER DODGE CO.,
Petitioner,

v.

CHRYSLER CORPORATION, et al.,
Respondents.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TOM P. MONTEVERDE,
MORRIS L. CHUCAS,
MAX L. LIEBERMAN,
PELINO, WASSERSTROM, CHUCAS & MONTEVERDE,
2300 Packard Building,
Philadelphia, Pa. 19102
(215) 665-8550
Attorneys for Petitioner.

RALPH S. SPRITZER,
3400 Chestnut Street,
Philadelphia, Pa. 19104
Of Counsel.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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APPENDIX A.

STATISTICAL EXCERPTS AND EXTRAPOLATIONS

DEALER ENTERPRISE PROGRAM

ANNUAL REVIEW OF DODGE DIVISION DEALERSHIP OPERATIONS

1964-1970

(A1)

Year	Percent of Dodge Total Sales by Dealer-ship in Chrysler Facilities	Percent of Dodge Sales D.E. Dealer-ships	Number of D.E. Dealer-ships at End of Period	D.E. Unit Sales	Actual Profit/(Loss) Before Taxes	Actual Profit/ (Loss) Per Unit Sold	Amount Required to Buy Out/ Convert (Preferred Stock)	Normal Return Before Taxes 14%	Total Subsidy Per Unit Sold
1964	17.4	12.1	105	54,758 (11 mos.)	149,824 (11 mos.)	2.74	2,715,500	380,170	(4.21)
1965	20.2	11.9	112	57,352 (10 mos.)	(179,151) (10 mos.)	(3.12)	1,760,400	246,456	(7.42)
1966	23.3	12.2	118	67,835 (11 mos.)	(198,319) (11 mos.)	(2.92)	8,265,100	1,157,114	(19.98)
1967	26.8	14.6	145	80,513	(803,242)	(9.98)	15,651,100	2,191,154	(37.19)
1968	30.2	16.3	146	108,722	1,368,496	12.59	16,357,400	2,290,036	(8.48)
1969	32.0	16.5	161	101,731	(3,526,926)	(34.67)	19,033,400	2,664,676	(60.86)
1970	36.1	18.4	163	96,288 (11 mos.)	(7,191,781) (11 mos.)	(74.69)	15,061,020	2,108,542	(96.59)

A review of lists of active and inactive Chrysler-Dodge D.E. Dealers 1967-1973 discloses that at the end of 1973, there were 296 D.E. dealers who had become D.E. dealers at various times before the end of 1973 and were still active; that another 131 D.E. dealerships had been liquidated, and that 81 dealerships (16.3% of the total) had been bought out by the private capital investor-operator.

DIRECT SUBSIDIES OF PHILADELPHIA REGION

DODGE D.E. DEALERS BY CHRYSLER, 1964-1970

Year	Dealer	Chrysler Direct Investment	Operating Results	Total Units Sold	Total Investment All Dealers	Normal Return on Investment Before Taxes (14%)	Total Operating Results Before Taxes	Total Gain-Loss Including Normal Return Before Taxes	Average Gain-Loss/ Unit Before Taxes
1964	Eagle	$ 72,700	$ (49,000)						
	Crescent	96,000	(94,000)						
	Jenkintown	102,900 (9 mos.)	(61,000)						
	Overbrook	86,200 (9 mos.)	(53,000)	2,854	$ 689,700	$ 66,774	$(267,000)	$(333,774)	$(116.94)
	Springfield	108,000 (4 mos.)	(25,000)						
	Northeast	83,700	61,000						
	Quaker City	140,200 (4 mos.)	(46,000)						
1965	Eagle	80,200	(72,000)						
	Crescent	96,000	(107,000)						
	Jenkintown	102,900	(4,500)						
	Overbrook	85,200	(120,010)						
	Springfield	108,000	44,000	4,722	821,700	107,951	(284,510)	(392,461)	(83.11)
	Northeast	83,700	71,000						
	Quaker City	197,200	(73,000)						
	Cherry Hill	67,500 (3 mos.)	(23,000)						
1966	Eagle	80,200 (10 mos.)	(66,000)						
	Crescent	96,000	(159,000)						
	Jenkintown	120,000	14,500						
	Overbrook	97,500	(66,000)						
	Springfield	104,100	64,000	5,487	908,900	125,375	(128,500)	(253,875)	(46.27)
	Northeast	73,600	35,000						
	Quaker City	270,000	63,000						
	Cherry Hill	67,500	(14,000)						

1967	Crescent	96,000 (2 mos.)	(32,000)						
	Jenkintown	112,900	52,000						
	Overbrook	97,500	(6,000)						
	Springfield	95,800	127,000						
	Northeast	59,600	(1,100)	5,237	1,007,800	114,632	255,723	255,723	48.83
	Quaker City	270,000	163,000						
	Cinnaminson	90,000 (6 mos.)	(12,000)						
	Cherry Hill	90,000	8,000						
	Black Horse	96,000 (4 mos.)	(43,177)						
1968	Jenkintown	104,800 (10 mos.)	43,000						
	Overbrook	97,500	(72,000)						
	Springfield	75,800 (4 mos.)	73,000						
	Deel	105,000 (9 mos.)	(28,000)						
	Northeast	59,600	31,000	6,100	991,500	125,615	74,000	(51,615)	(8.46)
	Quaker City	270,000	(8,000)						
	Cinnaminson	90,000	6,000						
	Cherry Hill	92,800	48,000						
	Black Horse	96,000	(19,000)						
1969	Overbrook	120,000 (10 mos.)	(150,000)						
	Deel	150,000	(204,000)						
	Northeast	52,500	39,000						
	Quaker City	337,500	(84,000)	5,014	923,100	126,434	(301,000)	(427,434)	(85.25)
	Cinnaminson	89,500	31,000						
	Cherry Hill	77,600	(34,000)						
	Black Horse	96,000	101,000						
1970	Deel Dodge	150,000	(136,000)						
	Northeast	52,500	24,000						
	Quaker City	337,500	(119,000)						
	Cinnaminson	89,500 (5 mos.)	40,000	4,485	771,800	100,743	(229,000)	(329,743)	(73.52)
	Cherry Hill	58,200	38,000						
	Black Horse	84,100	(76,000)						

Direct Subsidies of S. Jersey Dodge D.E. Dealers by Chrysler—1964-1970

Year	Dealer	Chrysler Direct Investment	Operating Results	Total Units Sold	Total Investment of Chrysler	Normal Return on Investment Before Taxes (14%)	Total Operating Results Before Taxes	Total Gain-Loss Including Normal Return Before Taxes	Average Gain-Loss/Unit Before Taxes
1964	Crescent	$96,000	$ (94,000)	573	$ 96,000	$13,440	$ (94,000)	$(107,440)	$(187.50)
1965	Crescent	96,000	(107,000)	520	163,500	15,803	(130,000)	(145,803)	(280.39)
	Cherry Hill	67,500 (3 mos.)	(23,000)						
1966	Crescent	96,000	(159,000)	1,240	163,500	22,890	(173,000)	(195,890)	(157.98)
	Cherry Hill	67,500	(14,000)						
1967	Crescent	96,000 (2 mos.)	(32,000)	1,069	372,000	25,620	(79,177)	(104,797)	(98.03)
	Cinnaminson	90,000 (6 mos.)	(12,000)						
	Cherry Hill	90,000	8,000						
	Black Horse	96,000 (4 mos.)	(43,177)						
1968	Cinnaminson	90,000	6,000	1,748	278,800	39,032	35,000	(4,032)	(2.31)
	Cherry Hill	92,800	48,000						
	Black Horse	96,000	(19,000)						
1969	Cinnaminson	89,500	31,000	1,913	263,100	36,834	98,000	98,000	51.23
	Black Horse	96,000	101,000						
	Cherry Hill	77,600	(34,000)						
1970	Cinnaminson	89,500	40,000	2,004	231,800	32,452	2,000	(30,452)	(15.20)
	Black Horse	84,100	(76,000)						
	Cherry Hill	58,200	38,000						

Operating Results of Dodge D.E. Dealers in Philadelphia Region, Chrysler Credit (Without Subsidy) and Chrysler Corporation Nationally

	Philadelphia D.E. Dealers as a Group			Chrysler Credit			Chrysler Corporation	
Year	*Total Direct Investment*	*Normal ROI Before Taxes 14%*	*Total Operating Results*	*Total Direct Investment*	*Normal ROI After Taxes 8%*	*Total Results Without Subsidy*	*Unit Sales*	*Net Profit (Loss)*
1964	$ 689,700	$ 66,774	$(267,000)	—	—	—	1,807,258	$213,770,000
1965	821,700	107,951	(284,510)	$110,000,000	$ 8,800,000	$ 167,000	2,076,523	233,377,000
1966	908,900	125,375	(128,500)	135,000,000	10,800,000	184,000	2,134,024	189,223,000
1967	1,007,800	114,632	255,723	150,000,000	12,000,000	2,914,000	2,251,803	200,434,000
1968	991,500	125,615	74,000	212,000,000	16,960,000	2,583,000	2,623,868	290,729,000
1969	923,100	126,434	(301,000)	227,500,000	18,200,000	(2,134,000)	2,445,445	88,771,000
1970*	771,800	100,743	(229,000)	293,800,000	23,504,000	(6,000,000)	2,459,336	(7,603,000)

* According to Chrysler Corporation's Annual Report for 1970 (statement on page 2), "The U. S. economy during 1970 experienced a combination of inflation and recession, high unemployment, high interest rates and restricted growth. Customer confidence was weakened by economic and social problems at home and by serious crises in the Middle East and Southeast Asia. A major strike in the automotive industry cut North American vehicle production and added to the consumers lack of confidence. As a result, United States automobile industry sales for the year reached the lowest point since 1962.

The company's financial results for 1970 reflect these economic factors. There was a drop in North American factory sales of 64,939 cars and trucks . . ."

EXHIBIT P-253
KUEHN EXHIBIT 4

Year		Investment in Chrysler Realty	Normal Return on Investment *	Operating Profit	Less: Service Fees From Affiliated Companies	Net Operating Loss	Loss of Return on Inv. + Loss	No. of Dealerships Serviced	Total Loss Per Dealership
1967	Stock	$ 62,500,000	$10,000,000						
	Notes	92,100,000	1,842,000						
	Guarantees	18,700,000	187,000						
	Total	173,300,000	12,029,000	$ 300,000	$ 925,000	$(625,000)	($12,654,000)	500	($25,308)
1968	Stock	96,500,000	15,440,000						
	Notes	96,600,000	1,932,000						
	Guarantees	42,500,000	425,000						
	Total	235,600,000	17,797,000	1,400,000	3,500,000	(2,100,000)	(19,897,000)	550	(36,176)
1969	Stock	130,100,000	20,816,000						
	Notes	54,100,000	1,082,000						
	Guarantees	100,000,000	1,000,000						
	Total	284,200,000	22,898,000	1,845,000	3,950,000	(2,105,000)	(25,003,000)	600	(41,672)
1970	Stock	134,200,000	21,472,000						
	Notes	57,300,000	1,146,000						
	Guarantees	99,000,000	990,000						
	Total	290,500,000	23,608,000	2,000,000	4,500,000	(2,500,000)	(26,108,000)	650	(40,166)

EXCERPT FROM EXHIBIT 254.

Retail Price Level—established by Chrysler D.E. Dealers		
MINUS		
Manufacturer's Net Price to Dealers—established by Chrysler		
MULTIPLIED BY		
Number of New Units Sold		
EQUALS		
Total Gross Profits		$157,104.00
less	2% Holdback	39,024.00
	Bonuses	31,342.00
Maximum Cash in Hand (provided no trade-in)		$ 86,738.00
Cash in Hand	$86,738.00	
DIVIDED BY		
Number of New Cars Sold	769	
Profit per car	$ 112.00	
MINUS		
Salesman's Commission per car	50.75	
Maximum Cash Profit per car	$ 61.25	

Other Operating Expenses to be paid from Cash in Hand

1) Dealer overhead
2) Trade-in carrying expense
3) Wholesale finance charges
4) Retail finance reserve
5) Warranty expense
6) Repossession exposure

APPENDIX B.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 1077-70

MARTIN B. GLAUSER DODGE CO.,
Plaintiff,

v.

CHRYSLER CORPORATION
CHRYSLER MOTORS CORPORATION
CHRYSLER FINANCIAL CORPORATION
CHRYSLER CREDIT CORPORATION
CHRYSLER REALTY CORPORATION,
Defendants.

ON MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR NEW TRIAL

OPINION.

(Filed August 20, 1976)

APPEARANCES:

MORRIS L. CHUCAS, Esquire
Cherry Hill, New Jersey 08034
Attorney for Plaintiff

PELINO, WASSERSTROM, CHUCAS
& MONTEVERDE, Esquires
By: TOM P. MONTEVERDE, Esquire
Philadelphia, Pennsylvania 19103
Of Counsel for Plaintiff

ARCHER, GREINER & READ, Esquires
By: JOHN P. HAUCH, JR., Esquire
Haddonfield, New Jersey 08033
Attorneys for Chrysler Corporation,
Chrysler Motors Corporation, and
Chrysler Realty Corporation,
Defendants

FARR, REIFSTECK, WOLF
& CRABTREE, Esquires
By: WILLIAM E. REIFSTECK, Esquire
Haddon Heights, New Jersey 08035
Attorneys for Chrysler Financial
Corporation and Chrysler Credit
Corporation, Defendants

DRINKER, BIDDLE & REATH, Esquires
By: ROBERT S. RYAN, Esquire
MICHAEL O'S. FLOYD, Esquire
Philadelphia, Pennsylvania 19107
Of Counsel for all Defendants

COHEN, *Senior Judge:*

Defendants have moved for judgment notwithstanding the verdict or alternatively a new trial, following an

adverse jury verdict in this private antitrust action brought pursuant to section 4 of the Clayton Act, 15 U. S. C. § 15.[1] The jury found that the defendants entered into a combination or conspiracy in unreasonable restraint of trade or commerce in violation of section 1 of the Sherman Act, 15 U. S. C. § 1,[2] causing injury to the plaintiff in the amount of 1.3 million dollars. This award was later trebled by the court to 3.9 million dollars. In support of these post-trial motions defendants assert three grounds. First, defendants contend that the plaintiff's theory of liability and method of computation of damages were invalid. Next, it is argued that the evidence was insufficient to support a finding that any of the defendants violated section 1 of the Sherman Act. Finally, defendants maintain that trial errors and infirmities in the court's charge warrant a new trial. For the reasons discussed below, the motions will be denied.

The central question presented here is whether and to what extent an automobile manufacturer may subsidize its partially owned dealers without providing similar assistance to independent dealers. More specifically the issue is whether the defendants' implementation of a vertically integrated distribution system had the effect of reducing intrabrand competition so as to violate section 1 of the Sherman Act. On motion for judgment notwithstanding the verdict pursuant to *Fed. R. Civ. P.* 50(b)

1. 15 U. S. C. § 15 provides: Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

2. 15 U. S. C. § 1 provides in relevant part: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . .

the court is required to accept the evidence and all reasonable inferences in the light most favorable to the plaintiff. *Continental Ore Co. v. Union Carbide,* 370 U. S. 690, 696 (1962); *Tennant v. Peoria & P. U. Ry.,* 321 U. S. 29, 35 (1944); *Coleman Motor Co. v. Chrysler Corp.,* 525 F. 2d 1338, 1344 (3rd Cir. 1975); *Denney v. Siegel,* 407 F. 2d 433, 439 (3rd Cir. 1969). Plaintiff, Martin B. Glauser Dodge Co. (Glauser Dodge) is a family owned New Jersey corporation which operated an automobile dealership in Vineland, New Jersey. Between February, 1964 and July, 1970 Glauser Dodge and its predecessor proprietorship owned by Martin B. Glauser sold and serviced new dodge automobiles and trucks pursuant to a franchise agreement with Chrysler Motors; and in addition sold used cars.

Chrysler Motors Corporation is a wholly owned subsidiary of Chrysler Corporation engaged in distribution. Chrysler Credit Corporation, which is a wholly owned subsidiary of Chrysler Financial Corporation, extends wholesale credit to and purchases retail installment contracts from Chrysler dealers. Chrysler Financial Corporation, in turn, is a wholly owned subsidiary of Chrysler Corporation and is the source of capital for the entire Chrysler financial operation. Chrysler Realty, also a wholly owned subsidiary of Chrysler Corporation, acquires, develops, and administers property for Chrysler dealer sites.

In an attempt to increase its overall market penetration Chrysler Corporation developed a Dealer Enterprise (DE) program. The major tenets of this marketing program are revealed in what has been identified as the "Quinn Memorandum."[3] The program envisioned the

3. The "Quinn Memorandum" refers to a report, written in 1961 by Mr. E. C. Quinn, Sales Vice-President for Chrysler, entitled "Market Representation Program." Exhibit P-7.

resurrection of Chrysler's dealership system through the infusion of venture capital to be provided in large part by Chrysler itself. As the Quinn Memorandum points out, outside investors did not find automobile dealerships in general, and Chrysler Corporation in particular, sufficiently attractive to provide the necessary venture capital. The money provided was to be used in three general areas: capitalization, facilities, and launching costs. The following practices, *inter alia*, were recommneded: [4]

1. Acquisition of existing facilities and leasing to operator;
2. Mortgage on existing facilities;
3. Sponsorship of capital loan program through finance companies whereby finance companies administer and Chrysler Corporation assumes partial financial responsibility;
4. Assumption of lease or guarantee of lease on existing facilities or facilities to be constructed; and
5. Use of contractual start up plan in relation to assumption of operating losses by Chrysler Corporation for a specified period. . . .

Under the Dealer Enterprise plan Chrysler supplied up to 75% of the capital needed to finance a new dealership. The 25% owner became manager of the dealership and could ultimately purchase the stock held by Chrysler out of his share of the profits. Until that time, however, Chrysler retained majority control. The program consistently produced net operating losses at the dealer level, but greater market penetration and the resulting increases in production permitted more efficient utilization of manufacturing facilities. Thus, as was explained by plaintiff's expert, Dr. Kuehn, the retail losses were offset by increased profits

4. Exhibit P-7 at 9.

at the manufacturing level. This pattern of operating losses at the retail level, experienced by DE dealers nationally, was also reflected by the four Camden area Dodge DE dealers which were in competition with the plaintiff.

The essence of plaintiff's antitrust claim is that the Dealer Enterprise marketing program operated in a discriminatory fashion vis-a-vis private capital dealers. There was evidence adduced at trial to show that: (1) Cars were advertised and sold through DE dealers at prices which were lower than private capital dealers, such as the plaintiff, could afford to charge. (2) Superior physical facilities were provided to DE dealers on terms which were not available to competing private capital dealers. (3) DE dealers were permitted to sell retail installment contracts to Chrysler Credit Corporation on a without recourse basis, whereas plaintiff was required to guarantee to repurchase defaulted retail installment contracts of its customers. (4) DE dealers were permitted to operate in an out-of-trust condition when experiencing cash flow problems, whereas plaintiff's credit was immediately revoked when it was out of trust. (5) Restrictions on plaintiff's wholesale lines of credit, as well as its inability to sell its commercial retail paper without recourse, precluded plaintiff from participating in revenue-producing sales contests to the same degree as DE dealers. (6) Plaintiff did not receive the new vehicles it had ordered for its 1969 opening, even though an ample number of such vehicles were delivered to the DE dealers in the Camden area.

The jury returned the following verdict in response to special interrogatories:

1. Did any of the defendants enter into any combination or conspiracy in unreasonable restraint of trade or commerce? Yes or no.

ANSWER: *Yes.*

2. If your answer to question 1 is yes, then which defendants did combine or conspire?

ANSWER: *Chrysler Corporation, Chrysler Motors Corporation, Chrysler Financial Corporation, Chrysler Credit Corporation, Chrysler Corporation.*

3. If your answer to question number 1 is yes, then was the plaintiff, Glauser Dodge Co. injured as a proximate result of such combination or conspiracy?

ANSWER: *Yes.*

4. If your answers to questions 1 and 3 are yes, state the amount of damages?

ANSWER: *1.3 million dollars.*

I. RESTRAINT OF TRADE.

Defendants contend that the evidence at trial was legally insufficient to support a finding that any defendant combined or conspired in unreasonable restraint of trade or commerce in violation of section 1 of the Sherman Act. The plaintiff does not assert that the mere existence of Chrysler's Dealer Enterprise program constituted a violation of the Act. Rather, the "rule of reason," *Standard Oil Co. v. U. S.*, 221 U. S. 1 (1911), must be applied in determining whether the implementation and operation of the Dealer Enterprise program, by the defendants in this case, had the effect of unreasonably discriminating in favor of the factory-controlled dealers to the detriment of competing private capital dealers resulting in an unreasonable restraint of trade or commerce.

A combination or conspiracy is, of course, an essential element of a section 1 violation. Defendants have argued

that a corporation cannot combine or conspire with its subsidiaries.[5] The Supreme Court has made clear, however, that

> [e]ven commonly owned firms must compete against each other, if they hold themselves out as distinct entities. "The corporate interrelationships of the conspirators . . . are not determinative of the applicability of the Sherman Act."

U. S. v. Citizens and Southern National Bank, 422 U. S. 86, 116-117 (1975), *citing U. S. v. Yellow Cab Co.*, 332 U. S. 218, 227 (1947). *See Perma Life Mufflers, Inc. v. Int'l. Parts Corp.*, 392 U. S. 132, 141-42 (1968). The Court of Appeals for the Third Circuit has specifically held in *Coleman Motor Co. v. Chrysler Corp.*, 525 F. 2d 1338 (3rd Cir. 1975) that "although a party cannot combine or conspire with itself, a parent corporation, such as [Chrysler Corporation], can combine or conspire with its wholly owned subsidiaries." *Id.* at 1345. In order to show that a Sherman Act conspiracy existed plaintiffs are not required to prove that the defendants entered into an explicit agreement. *U. S. v. General Motors Corp.*, 384 U. S. 127, 132-43 (1966); *U. S. v. Parke-Davis & Co.*, 362 U. S. 29, 44-45 (1960). Circumstantial evidence including the conduct of the parties may be relied upon to prove the existence of the conspiracy or agreement. *Coleman*, 525 F. 2d at 1345. The various acts complained of should be viewed together in determining whether defendants entered into a combination or conspiracy. As the Supreme Court stated in *Continental Ore Co. v. Union Carbide*, 370 U. S. 690 (1960):

> It is apparent from the foregoing that the Court of Appeals approached Continental's claims as if they were five completely separate and unrelated law suits.

5. Defendant's main brief, at 100.

> We think that this was improper. In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components in wiping the slate clean after scrutiny of each. "[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *United States v. Patten,* 226 U. S. 525, 544 . . . ; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it." *American Tobacco Co. v. United States,* 147 F. 2d 93, 106 (C. A. 6th Cir.) See *Montague & Co. v. Lowry,* 193 U. S. 38, 45-46.

370 U. S. at 698-99.

Not only was there considerable direct testimony concerning the overall plan to give preferential treatment to DE dealers, but there was also circumstantial evidence that the named defendants were part of a combination or conspiracy. Both Chrysler Credit, which absorbed losses on DE dealers' retail installment paper, and Chrysler Realty, which leased facilities to DE dealers for less than the amount required to amortize the underlying loans for construction of those facilities, received direct contributions from Chrysler Corporation and Chrysler Motors Corporation. Thus sufficient evidence was presented to create a jury question as to whether a combination or conspiracy existed among the named defendants. *See Coleman,* 525 F. 2d at 1345; *Mt. Lebanon Motors, Inc. v. Chrysler Corp.,* 283 F. Supp. 453, 458 (W. D. Pa. 1968), *aff'd.,* 417 F. 2d 622 (3rd Cir. 1969).

Defendants further contend that economic activities are not actionable under the antitrust laws unless they cause an injury to the public.[6] The Sherman Act was, of

6. Defendants' main brief, at 101.

course, designed to protect the public from injury, *Coleman,* 525 F. 2d at 1346. Congress determined by legislative fiat, however, that certain classes of restraints of trade were by their "nature or character" injurious to the public. *Klors v. Broadway-Hale Stores,* 359 U. S. 207, 210-211 (1959); *Radovich v. National Football League,* 352 U. S. 445, 453-454 (1957); *Apex Hosiery Co. v. Leader,* 310 U. S. 469, 493 (1940); *Standard Oil Co. v. U. S.,* 221 U. S. 1, 58, 65 (1911). Where economic activities have a "tendency" to unreasonably restrain trade in light of the congressionally determined criteria of public harm, "it [is] not for the courts to decide whether in an individual case injury [has] actually occured." *Klors v. Broadway-Hale Stores,* 359 U. S. 207, 211 (1959), *citing Standard Oil Co. v. U. S.,* 221 U. S. 1, 63-68 (1911). *See Radovich v. National Football League,* 352 U. S. 445, 453-454 (1957); *Standard Sanitary Manufacturing Co. v. U. S.,* 226 U. S. 20, 49 (1912); *U. S. v. American Tobacco Co.,* 221 U. S. 106, 179 (1911). Therefore, in a private antitrust action the plaintiff is not required to prove an injury to the public as a material element in his case. *Coleman,* 525 F. 2d at 1346.

It is essential, however, that plaintiff show that the challenged practices adversely affected "competition in the marketplace." *U. S. v. Arnold Schwinn & Co.,* 388 U. S. 365, 375 (1967); *Wright Motor Co. v. U. S.,* 372 U. S. 253, 262 (1963); *Coleman,* 525 F. 2d at 1346; *Venzie Corp. v. United States Mineral Products Co.,* 521 F. 2d 1309, 1316 (3rd Cir. 1975). Regardless of the extent of injury suffered by Glauser Dodge there can be no recovery unless the defendants' conduct produced a substantially adverse effect on competition in the relevant market. As the Supreme Court emphasized in *Brown Shoe Co. v. U. S.,* 370 U. S. 294 (1962), "[i]t is competition, not competitors which the Act protects." *Id.* at 344.

There was sufficient evidence adduced at trial to permit the jury to infer that as a result of the defendants' preferential treatment of the DE dealers, Glauser Dodge was eventually forced out of business. The court of appeals in *Coleman, supra,* found that the elimination of an independent Chrysler dealer, as a result of the implementation of Chrysler's Dealer Enterprise program, had an adverse effect on competition in the marketplace. 525 F. 2d at 1347. The court reasoned that there was an impact upon the prices charged for new automobiles and the service provided by Chrysler Dealers.

> [W]e perceive an anti-competitive effect from the elimination of the Coleman dealership. As long as there are several Dodge dealerships with different owners, they can compete within the narrow range of price jurisdiction for the sales of those persons who want Dodge vehicles. The elimination of an independent dealer diminishes that competition. If all independent dealerships were eliminated, Chrysler could eliminate price competition within the full range of price jurisdiction. Another area of competition between automobile dealers is service. If all independent dealers were eliminated, competition in price of parts and service and in quality of service could also be eliminated. . . . [I]t is common knowledge that quality of service is vital to a successful automobile dealership.

525 F. 2d at 1347. (citations omitted).

In *Mt. Lebanon Motors, Inc. v. Chrysler Corp.*, 283 F. Supp. 453 (W. D. Pa. 1968), the plaintiff urged essentially the same arguments as did Glauser Dodge in attacking Chrysler Corporation's implementation of the Dealer Enterprise program. There was evidence offered tending to show that the Chrysler-financed dealerships engaged in predatory practices to eliminate independent competitors, and that losses at the retail level were offset by Chrysler's manufacturing profits. The court concluded that a jury question was presented as to whether Chrysler's forward integration resulted in an unreasonable restraint of trade, 283 F. Supp. at 457-460, and the Court of Appeals for the Third Circuit affirmed. 417 F. 2d 622 (3rd Cir. 1969). *Mt. Lebanon Motors* was also cited with approval by the court of appeals in *Rea v. Ford Motor Co.*, 497 F. 2d 577, 590 (3rd Cir. 1974).

The district court in *Rea v. Ford Motor Co.*, 355 F. Supp. 842 (W. D. Pa. 1973) also found a violation of the antitrust laws resulting from Ford Motor Company's implementation of its manufacturer-financed dealership program.

> Ford Motor Company, by operating factory stores and dealer development stores which were under its domination, was in competition with its own dealers. Therefore, when it adopted a course of action in combination with such stores to drive any of these independent dealers out of business or to dominate the market, it was certainly engaged in combination or conspiracy or [sic] restraint of trade under the Sherman Act. *See United States v. McKesson and Robbins, Inc.*, 351 U. S. 305 (1956).

355 F. Supp. at 865. The court of appeals reversed on other grounds, discussed *infra,* but did not disturb the above analysis, stating that their "decision . . . in no way undermines the proposition that automobile manufacturers are subject to the strictures of the antitrust laws in the operation of their wholly owned outlets." *Rea v. Ford*

Motor Co., 497 F. 2d 577, 590 (3rd Cir. 1974). Moreover, it has been held that the elimination of competitors from any substantial market constitutes a restraint of trade, regardless of whether there is a discernible impact upon the national economy. *Klors v. Broadway-Hale Stores*, 359 U. S. 207, 213 (1959); *International Salt Co. v. U. S.*, 332 U. S. 392, 395-396 (1947); *Mt. Lebanon Motors*, 283 F. Supp. at 459.

It must also be shown, of course, that the defendants' actions which resulted in a restraint of trade were unreasonable. In determining whether or not a particular combination or conspiracy restrained trade unreasonably, one of the factors the jury must consider is the business or economic rationale which motivated the defendants' conduct. *U. S. v. Arnold Schwinn & Co.*, 388 U. S. 365, 375 (1967); *Chicago Board of Trade v. U. S.*, 246 U. S. 231, 238 (1918). The defendants point out that it is not unlawful for an automobile manufacturer to create new retail outlets and to provide financial assistance to them. They argue that it was necessary to fill gaps in their retail distribution system in order to compete effectively against General Motors Corporation and Ford Motor Company. Any adverse effect upon intrabrand competition, defendants contend, would be justified by the enhancement of interbrand competition. The Supreme Court has made clear, however, that legitimate business motives do not immunize otherwise objectionable conduct. *U. S. v. Arnold Schwinn & Co.*, 388 U. S. 365, 375 (1967); *Delaware Valley Marine Supply Co. v. The American Tobacco Co.*, 184 F. Supp. 44 (E. D. Pa. 1960), *aff'd.* 297 F. 2d 199 (3rd Cir.), *cert. denied* 369 U. S. 839 (1962). The defendants' business reasons are relevant only "because knowledge of intent may help the Court to interpret facts and to predict the consequences." *Chicago*

Board of Trade v. U. S., 246 U. S. 231, 238 (1918). Rather, the court's inquiry must focus upon effect, not intent. *Coleman*, 525 F. 2d at 1345, n. 10.

While there is nothing inherently unlawful in attempting to increase profits at the manufacturing level by operating retail outlets at a loss or break-even basis, *Mt. Lebanon Motors*, 283 F. Supp. at 458, *citing U. S. v. Aluminum Co. of America*, 233 F. Supp. 718, 727-728 (E. D. Mo. 1974) and *Reynolds Metal Co. v. FTC*, 309 F. 2d 223, 229 (D. C. Cir. 1962), a violation of the Sherman Act results if competition in the marketplace is adversely affected in the process. The court of appeals explained in *Coleman, supra*, that although a totally vertically integrated distribution structure may be permissible, "it is at least subject to the qualification that a lawful end achieved by unlawful means is not protected from the antitrust laws." 525 F. 2d at 1347. While the Sherman Act, to be sure, is aimed at preserving competitive activity, there is no justification for violating the Act in one particular market in order to further competition in a larger, more important market. In *U. S. v. Topco Associates Inc.*, 405 U. S. 596 (1972) the Supreme Court stated that:

> [a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or

> groups believe that such foreclosure might promote greater competition in a more important sector of the economy. Cf. *U. S. v. Philadelphia National Bank*, 374 U. S. 321, 371 (1963).

405 U. S. at 610. In any event, defendants' desire to increase Chrysler's competitiveness on the interbrand level does not explain the reasonableness of their conduct. Indeed, this goal could have been more effectively pursued had the financial and other assistance which the defendants provided DE dealers, been extended to independent dealers as well. The court concludes that sufficient evidence was adduced at trial to support a finding that the defendants violated section I of the Sherman Act.

II. Theory of Damages.

Recovery under section 4 of the Clayton Act, 15 U. S. C. § 15 is not warranted merely by proof that the defendants have violated the antitrust laws. In addition, it must be demonstrated that the defendants' conduct caused injury to the plaintiff's "business or property." The plaintiff must then show the amount of damages which have been suffered, using a reasonable method of computation.

The fact of injury may be shown by circumstantial evidence. Due to the practical difficulty of marshalling evidence in private antitrust actions, the Supreme Court has stated that the fact of injury should not be subject to a rigorous standard of proof. *Zenith Corp. v. Hazeltine*, 395 U. S. 100 (1969):

> Trial and appellate courts alike must . . . observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion

> from a market; damage issues in these cases are rarely susceptible of the kind of concrete detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the fact finder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiff's business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants wrongful acts had caused damage to the plaintiffs."

Id. at 123-124, citing *Bigelow v. RKO Pictures, Inc.*, 327 U. S. 220, 264 (1946). The fact finder may draw a reasonable inference from the evidence presented at trial to conclude that a causal relationship existed between the defendants' conduct and the injuries complained of:

> [T]he jury may find a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances "juries are allowed to act upon probable and inferential, as well as direct and positive proof." *Story Parchment Co. v. Patterson Co.*, 282 U. S. 555, 561-564 (1931), *Eastman Kodak Company v. Southern Photo Co.*, 273 U. S. 359, 377-379 (1927).

Bigelow v. RKO Pictures, Inc., 327 U. S. 220, 264-265 (1946). The court must determine, then, whether sufficient evidence was produced for the jury to find a "reasonable probability," *Flintkote Co. v. Lysfjord*, 246 F. 2d 368, 392 (9th Cir. 1957), that the defendant's conduct was a "material cause of some injury to [plaintiff's] business or property." *Rea v. Ford Motor Co.*, 497 F. 2d 577, 589 (3rd Cir. 1974).

Although the theory of the section I violation of this case is based upon the elimination of the plaintiff from the marketplace, recovery is not limited to the value of Glauser Dodge as a going concern when it was forced out of business.[7] Defendants are also liable for causing injuries to the plaintiff while it was still in business, if those injuries contributed to its ultimate elimination from the marketplace. *See Brown Shoe Co. v. U. S.*, 370 U. S. 294, 346 (1962); *Klors v. Broadway-Hale Stores*, 359 U. S. 207, 213-214 (1959); *Times-Picayune*, 345 U. S. 594, 622-623 (1953); *International Salt Company v. U. S.*, 332 U. S. 392, 396 (1947); *NBO Industries Treadway Companies v. Brunswick Corp.*, 523 F. 2d 262, 272 (3rd Cir. 1975).

Once the fact of injury has been established, the plaintiff must then show the amount of damages suffered by a reasonable method of computation without resorting to speculation or guess work. *Bigelow v. RKO Pictures*, 327 U. S. 220, 264 (1946). As with the fact of injury, however, courts have not insisted upon unduly rigorous proof of the quantum of plaintiff's injury. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U. S. 100, 123-124 (1969); *Story Parchment Co. v. Patterson Parchment*

7. Defendants incorrectly cite *Coleman* for the proposition that a plaintiff asserting a "company dealership" claim must prove that it was, in fact, eliminated from the marketplace. Defendants supplemental brief, at 5-6. The court in *Coleman* did not take this position, nor did it imply that damages would be limited to the value of the business destroyed. *See Coleman*, 525 F. 2d at 1351-1353. It is well settled that "the antitrust laws strike equally at nascent and accomplished restraints of trade, monopolistic designs as well as results are reached by the prohibition of the Sherman Act." *Times-Picayune v. U. S.*, 345 U. S. 594, 622-623 (1953). See discussion, *infra*, regarding damages recoverable for injuries incurred prior to elimination from the marketplace. In any event, there was sufficient evidence presented at trial to support a jury finding that defendants' conduct in violation of the antitrust laws resulted in the demise of Glauser Dodge.

Paper Co., 282 U. S. 555, 563-564 (1931); *Coleman*, 525 F. 2d at 1352-1353. The liberal standard for computation of damages in private antitrust actions has been adopted not only because of practical limits of the burden of proof, but also in view of the public function served by such actions.[8]

Thus, both the fact of injury and the quantum of damages must be analyzed for each element of damages sought by the plaintiff. The first claim for recovery is based upon the defendants' subsidy of the Camden area DE dealers' operating losses. The theory of the operating loss subsidy was explained by the plaintiff's expert witness, Dr. Kuehn, as follows: The Camden area DE dealers sold new automobiles at a minimal markup resulting in overall operating losses which were subsidized by Chrysler. Since the prices Glauser Dodge could charge for new automobiles were, in effect, controlled by these competitors, Glauser suffered a direct injury from this discriminatory treatment. Dr. Kuehn computed the amount by which the DE dealers' return on investment fell short of a projected 14 per cent "normal" pre-tax profit. He then determined the average loss-per-car absorbed by the DE dealers and multiplied that figure by the number of units sold each year by the plaintiff. Although there was conflicting testimony at trial, sufficient evidence was presented for the jury to conclude that the DE dealers' overlapping sales territory and advertising practices forced Glauser Dodge to sell new automobiles at approximately the same low markups. In contrast to *Rea v. Ford Motor Co.*, 497 F. 2d 577 (1974), the plaintiff here has demonstrated the fact of injury resulting from the defendants' discriminatory conduct. The plaintiff in *Rea* employed a subsidy approach, but failed to demonstrate any direct injury to his business or prop-

8. Areeda, *Anti-Trust Violations without Damage Recoveries*, 89 *Harv. L. Rev.* 1127 (1976).

erty. The independent dealer produced no evidence that the Ford-owned outlets engaged in predatory price cutting, or that it had been compelled to lower prices. The plaintiff made no attempt to show that it had incurred greater operating expenses or had lost any profit as a result of the operation of the company-owned outlet. The court of appeals observed that the attorney for the independent dealer expressly disavowed any such claims:

> What our position is in this case is what 22 Ford did or did not do is not relevant because we are not asserting in our case that 22 Ford sustained a loss of profits . . . [W]e haven't put any evidence in the record to indicate any particular loss sustained by 22 Ford.

497 F. 2d at 589.

Plaintiff asserts that since its prices were controlled by the DE dealers, the measure of damages is, therefore, a proportional amount of the discriminatory subsidies provided by Chrysler. Glauser's profit margin was decreased to the extent its competitors were illegally favored.[9] This method of computing damages is a reasonable estimate of those profits lost by Glauser Dodge which can be traced to illegal conduct by the defendants. The computed subsidies for operating losses-per-car of the Camden area DE dealers are as follows:

1964	$187.50
1965	280.39
1966	157.98
1967	98.03
1968	2.31
1969	None
1970	15.20

9. Plaintiff's main brief, at 112.

The plaintiff perhaps could have sought a greater recovery for lost profits by subtracting the actual average markup on new automobiles from some hypothetical markup which the market would have borne absent competition from the Camden area DE dealers.[10] Such an approach in this case, however, would have failed to account for the effect of lawful competition from these DE dealers. *See Coleman*, 525 F. 2d at 1352.[11] If a direct correlation can be shown between an antitrust defendants' discriminatory conduct and the profits lost by the plaintiff, the amount of discrimination is an acceptable measure of damages. *See Hanover Shoe v. United Shoe Machine Corp.*, 392 U. S. 481, 489 (1968); *Bruce's Juices v. American Can Co.*, 330 U. S. 743, 757 (1947); *cf. Union Carbide and Carbon Corp. v. Nisely*, 300 F. 2d 561, 580 (10th Cir. 1961). Where "prices are illegally discriminatory, petitioner has been damaged, in the absence of extraordinary circumstances, at least in the amount of that discrimination." *Bruce's Juices v. American Can Co.*, 330 U. S. 743, 757

10. For example, plaintiff might have asserted one of the two major theories of proving lost profits in private antitrust suits. By using the "before and after" approach Glauser might have introduced evidence of the average markup on its new automobiles prior to the depressing influence of the DE dealers. By using the "yardstick" test plaintiff could have shown the average markup used by firms closely comparable to Glauser Dodge which were unaffected by such restraints during the time period in question. See Note, *Private Treble Damages Anti-Trust Suits; Measure of Damages for Destruction of All or Part of a Business*, 80 *Harv. L. Rev.* 1566, 1574-1575 (1967).

11. For illustrative purposes only, if we assume that the market would bear a markup of $400, lawful competition from four new Chrysler dealers in the area making a normal return on investment of 12% might reduce the competitive selling price to a markup of, for instance, $300. If as a result of discriminatory subsidies from Chrysler these dealers were able to reduce their markup to $200, the plaintiff's actual injury attributable to the unlawful conduct of the defendants would amount to only $100 per automobile, rather than $200.

(1947). "The reason is that he has paid more than he should and his property had been illegally diminished, for had the price been lowered his profits would have been higher." *Hanover Shoe v. United Shoe Machine Corp.*, 392 U. S. 481, 489 (1968). In the instant case, instead of directly overcharging the plaintiff, the defendants have obtained the same result by subsidizing the competition which established the plaintiff's sales price. Thus, Glauser's lost profits can be measured by the amount of discrimination to which it has been subjected.[12]

Plaintiff then produced evidence of actual losses it had suffered as a result of the defendants' discriminatory refusal to purchase its retail paper on a without recourse basis. Glauser Dodge was forced to repossess and sell at a loss a substantial number of cars each year. The amount of damages for this fact of injury included the loss on the dealer's actual investment in each repossessed car, as well as the profit it would have realized normally in selling such a used car.

Plaintiff demonstrated a fact of injury and a reasonable measure of damages to support its claim for interest losses on its Chrysler Credti reserve account and short term borrowings. Glauser was required to maintain a non-interest bearing reserve account to cover claims for

12. Defendants cite *ICC v. U. S.*, 289 U. S. 385 (1933) and *Enterprise Industries v. Texas Co.*, 240 F. 2d 457 (2d Cir. 1957) for the proposition that the amount of discrimination is not a permissible measure of damages in an antitrust suit. These cases, however, involved application of the "pass-on" defense to price discrimination suits, which has since been rejected by the Supreme Court. *Hanover Shoe v. United Shoe Machine Corp.*, 392 U. S. 481, 483, 495 (1968); Note, *Private Treble Damage Anti-Trust Suits; Measure of Damages for Destruction of All or Part of a Business*, 80 *Harv. L. Rev.* 1566, 1584-1586. In any event, the court in *Enterprise Industries v. Texas Co., supra*, conceded that where the plaintiff's profit margin is directly affected "the amount of the discrimination might well be a proper measure of [his] damages." *Id.* at 459.

repossessions, since its retail paper was not purchased on a without recourse basis. There was testimony that the defendants withheld payments for warranty work and incentive bonuses making it necessary for the plaintiff to obtain short term loans, thus incurring further interest losses.

There was also sufficient evidence of the fact of injury suffered by Glauser Dodge as a result of the defendants' failure to provide physical facilities comparable to those made available to the Camden area DE dealers.

Dr. Kuehn testified that the DE dealers were provided with superior facilities at rental rates which were less than the amounts a private capital dealer such as Glauser Dodge would have to expend to offset construction costs, depreciation, and principal payments on an amortized conventional loan for such facilities. The plaintiff computed the measure of damages by showing the actual costs it had incurred in 1969 and 1970 for reduction of principal and building depreciation. For the years 1965 to 1969 the plaintiff estimated the benefits it had been denied by determining the amount of construction costs, depreciation, and principal payments, from which the Camden area DE dealers had been exempted.

Plaintiff further claimed that as a result of being forced out of business by the defendants' cumulative discriminatory acts, it suffered a direct loss in the value of its new showroom facilities and the value of its inventory. Since the showroom facility was a single purpose property, the reduction in value was a direct result of the plaintiff being forced out of business. Evidence of the before and after value of the showroom facility was corroborated by the defendants' own appraisal of April 1, 1970, and the pretrial stipulation of the parties. The diminution in the value of plaintiff's inventory resulted from Chrysler's re-

fusal to purchase the inventory and sell it to another dealer as was its normal practice upon termination of a dealership. Instead plaintiff was forced to liquidate the inventory piecemeal at a substantial loss.

Plaintiff also sought recovery for the value of the business as a going concern. The current market value of a business is, in theory, the discounted present value of the estimated flow of future earnings.[13] A basis for this estimate is the record of profits for the business in prior years.[14] The evaluations of Glauser Dodge as a going concern, made by plaintiff's expert witness, William Tarlo, were based upon the operating statements of the business over a five year period. There was testimony that the operating statements were more reliable data than the corresponding tax returns of those years because of the tax treatment of parts and used car inventory. In computing the record of earnings over the prior five years, however, Mr. Tarlo failed to deduct as a business expense the salaries paid to Barry Glauser and Mrs. Glauser, thus inflating the records of profits. *Coleman*, 525 F. 2d at 1351-1352, n. 22.

Where it is apparent that as a matter of law certain identifiable sums were included in the jury's verdict which were improper, the court has the power to condition the denial of the motion for a new trial upon the filing by the plaintiff of a remittitur in the specified amount. *Dimick*

13. Note, *Private Treble Damage Anti-trust Suits; Measure of Damages for Destruction for All or Part of Business*, 80 *Harv. L. Rev.* 1566, 1580-1581 (1967).

14. Since the challenged practices continued for several years leading up to the elimination of Glauser Dodge from the marketplace, the plaintiff properly presented to the jury estimates of the value of the business as a going concern based upon its actual performance in prior years and, alternatively, based upon the earnings which the business would have had absent the defendants' unlawful conduct.

v. Schiedt, 293 U. S. 474, 483-486 (1935); *Holmes v. Wack*, 464 F. 2d 86 (10th Cir. 1972); *Jones v. Friesel*, 207 F. Supp. 925, 926-927 (W. D. Pa. 1962). The portion of the claim for the value of the business as a going concern, which is attributable to the treatment of owners' salaries as earnings, can be accurately computed. For the two methods of evaluation employed by Mr. Tarlo the amounts are respectively $78,254.00 and $67,075.00.[15] Consistent with the right to trial by jury guaranteed by the Seventh Amendment, an excessive verdict should be reduced only to the maximum amount that the jury might properly have awarded. *U. S. v. 1,160.96 acres of land in Holmes County, Mississippi*, 432 F. 2d 910 (5th Cir. 1970); 11 Wright & Miller, *Federal Practice and Procedure* 104. Thus, the plaintiff will be required to remit the amount of $201,225.00.[16] Due to the nature and amount of this improper element of damages, evidence regarding it was not so prejudicial as to have infected the decision of the jury on the question of liability or the remainder of the damages. *Cf. Minneapolis, St. P. & S. Ste. M. Ry. v. Moquin*, 283 U. S. 520 (1931); *Ford Motor Co. v. Mahoney*, 205 F. 2d 267 (4th Cir. 1953).

III. Trial Errors.

Defendants finally contend that a new trial is warranted due to errors in the admission of certain evidence during the trial, the opening and closing arguments of counsel for plaintiff, and the charge to the jury. The thrust of the defendants' discussion of these alleged errors is that the evidence and argument presented by the plaintiff were not supported by a valid theory of liability under

15. The estimates were based upon the "times earnings" method and the section 1001 of the Internal Revenue Code method. Revised Exhibits P-12A and P-12B.

16. $67,075.00 trebled.

the antitrust laws. These arguments have been addressed at length in parts I and II above. The court has carefully considered the defendants' remaining contentions and concludes that there were no errors so prejudicial as to affect the substantial rights of the parties. *Fed. R. Civ. P.* 61.

Therefore, the defendants' motions for judgment notwithstanding the verdict or a new trial will be denied, conditioned upon the filing of a stipulation within twenty (20) days that $201,225 of the amount awarded under the verdict will be remitted by the plaintiff.

An appropriate order may be submitted.

MITCHELL H. COHEN
Mitchell H. Cohen, Senior Judge
United States District Court

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 76-2390 and 77-1188

MARTIN B. GLAUSER DODGE CO.

v.

CHRYSLER CORPORATION
CHRYSLER MOTORS CORPORATION
CHRYSLER FINANCIAL CORPORATION
CHRYSLER CREDIT CORPORATION
CHRYSLER REALTY CORPORATION
Appellants

(D. C. Civil No. 1077-70)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued September 9, 1977

Before GIBBONS, WEIS and GARTH, *Circuit Judges*

Tom P. Monteverde
Morris L. Chucas
Max L. Lieberman
Counsel for Martin B. Glauser Dodge Co., Appellee

Robert S. Ryan
Michael O'S. Floyd
Catherine B. Strauss
Drinker Biddle & Reath
1100 PNB Building
Philadelphia, Pa. 19107

William E. Reifsteck
Farr, Reifsteck and Wolf
a Professional Corporation
Haddon Heights, N. J. 08035
Counsel for Chrysler Financial Corporation and Chrysler Credit Corporation

John P. Hauch, Jr.
Archer, Greiner & Read
a Professional Corporation
Haddonfield, N. J. 08033
Counsel for Chrysler Corporation, Chrysler Motors Corporation and Chrysler Realty Corporation

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OPINION OF THE COURT

(Filed November 14, 1977)

GIBBONS, *Circuit Judge*

This is an appeal from a final judgment of the District Court denying defendants' motions for judgment notwithstanding the verdict or for a new trial, after a jury verdict in favor of the plaintiff on its claim for money damages

under § 4 of the Clayton Act [1] for alleged violations of § 1 of the Sherman Act.[2]

The plaintiff, Martin B. Glauser Dodge Co. (hereinafter Glauser Dodge) is a family-owned New Jersey corporation which formerly operated a franchised Dodge automobile dealership in Vineland, Cumberland County, New Jersey. The defendants are Chrysler Corporation, three of its wholly owned subsidiaries—Chrysler Financial Corporation, Chrysler Realty Corporation, and Chrysler Motors Corporation—and Chrysler Credit Corporation, a wholly owned subsidiary of Chrysler Financial Corporation (hereinafter collectively Chrysler). Although separately incorporated, each of the defendant subsidiaries is part of an integrated Chrysler enterprise engaged in the manufacturing and marketing of automobiles, including, at the relevant time, Dodge automobiles.[3]

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1. 15 U. S. C. § 15 (1970):
Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

2. 15 U. S. C. § 1 (1970):
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . .

In its complaint, plaintiff also alleged violations of the Robinson-Patman Act, 15 U. S. C. § 13(a) (1970), and of § 1 of the Sherman Act, 15 U. S. C. § 2 (1970). At the close of the evidence, however, these claims were dismissed.

3. Chrysler Motors Corporation engages in distribution, while Chrysler Financial Corporation provides capital for the entire Chrysler financial operation. Chrysler Realty acquires, develops, and administers property for Chrysler dealer sites. Chrysler Financial Corporation extends wholesale credit to and purchases retail installment contracts from Chrysler dealers.

This case requires that we explore once again the antitrust implications of competition between independently owned franchised retail dealers and franchised retail dealers established by the manufacturer under the well-known Dealer Enterprise (DE) program.[4] In denying defendants' motions, the District Court held that there was sufficient evidence to support the jury's verdict that the defendants' subsidizing of their partially owned dealers without providing similar assistance to independent dealers constituted an unreasonable restraint in violation of § 1 of the Sherman Act. We conclude that the Court erred in denying defendants' motion for judgment notwithstanding the verdict, and we reverse.

I

The Dealer Enterprise Program

Critical to the understanding of the antitrust issues presented by this case is an understanding of the emergence of the DE program in the automobile industry, for

4. Aspects of the automobile industry's DE program have been considered in other cases without definitive results. *See* Coleman Motor Co. v. Chrysler Corp., 525 F. 2d 1338 (3d Cir. 1975), *vacating and remanding* 376 F. Supp. 546 (W. D. Pa. 1974); Rea v. Ford Motor Co., 497 F. 2d 577 (3d Cir. 1974), *reversing and remanding* 355 F. Supp. 842 (W. D. Pa. 1973); England v. Chrysler Corp., 493 F. 2d 269 (9th Cir.), *cert. denied*, 429 U. S. 869 (1974); Mt. Lebanon Motors, Inc. v. Chrysler Corp., 283 F. Supp. 453 (W. D. Pa. 1968). None of these cases sustained a judgment against a manufacturer because of the operation of the DE program. However, several cases recognized the possibility that in appropriate circumstances an independently owned dealer could recover for injury to his business or property caused by the competition of a DE dealer. *See, e.g.*, Coleman Motor Co. v. Chrysler Corp., *supra*, at 1343-48; Mt. Lebanon Motors, Inc. v. Chrysler Corp., *supra*, at 456-61. An appeal is pending in this court from an order granting defendants' motion for judgment notwithstanding the verdict in favor of the same defendants involved in the instant case. Elfman Motors, Inc. v. Chrysler Corp., No. 72-1282 (E. D. Pa. August 9, 1977).

without that understanding it is impossible to appreciate the operation of that program in what plaintiff contends is the relevant market at the relevant time. To a great extent the structure of automobile distribution is common economic knowledge and has been described in varying details in the cases referred to in note 3. The description which follows, however, is developed from the evidence in this case—in particular plaintiff's exhibits P-7 and P-8. Exhibit P-7 is a lengthy memorandum prepared in August of 1961 by E. C. Quinn, Sales Vice President of Chrysler, setting forth the reasons why Chrysler should embark on an expanded DE program. Exhibit P-8 is a letter dated April 12, 1962, from Mr. Quinn to all Chrysler Motors Corporation personnel on the subject "Sales and Marketing Representation Programs" outlining the deficiencies in Chrysler's distribution system and discussing remedies.

Automobile manufacturing, to state the obvious, is a capital intensive business in which investment in large manufacturing facilities achieves economics of scale and, if those facilities are utilized at or near capacity, lower unit costs and higher unit profits. Automobile retailing and servicing, on the other hand, requires wide dispersion of individual facilities, each typically requiring relatively low capital investment and, like many other retail businesses, operating on low unit profits but sometimes high returns on capital investment. But while capital investment in an individual automobile retailing establishment typically is small, the total capital investment in all such facilities is enormous. Historically, the automobile manufacturers have preferred to concentrate their investment in manufacturing facilities, leaving automobile retailing to private venture capital. This historical pattern, while offering the industry the advantage of being able to concentrate its resources in the manufacturing end, had the

disadvantage that those manufacturing resources could not be used to near capacity and hence could not be profitable, if private venture capital investment at the retail end, and thus sales, failed to increase in proportion to manufacturing capacity. That, unfortunately, is what occurred in the late 1950's. This pattern is reflected in the following table of Manufacturers' and Dealers' Net Worth at Year End, which appears in Exhibit P-7: [5]

	The Five Auto Manufacturers	*All Franchised New Car Dealers*
1954	$5.9	$4.4
1955	7.2	4.1
1956	7.5	4.3
1957	8.1	4.3
1958	8.2	4.4
1959	8.9	4.2
1960	9.7	3.9

The increase in manufacturers' net worth, in a period during which the investment in the separately owned retail industry on which utilization of manufacturing capacity depended was level or declining, created a serious problem for the whole industry. Between 1950 and 1962 the number of automobile dealers in this country declined from 47,000 to 32,000. *See* Exhibit P-8.

In part at least, the inability of the retail end of the business to keep old or attract new venture capital was the result of the same forces which have destroyed retail centers nationwide. With dispersion and suburbanization,

5. Automobile Manufacturers' Annual Report and National Association of Automobile Dealers' Association (numbers in billions of dollars).

the once familiar city "automobile row" became as anachronistic as the once familiar row of downtown department stores. At the same time, suburbanization created the need for new and different retail sales and service locations. And unlike soft goods retailing, in which some retailing giants had the capacity to move with the times, there were few giants among the automobile retailers. Undoubtedly the manufacturers contributed to the decline as well, by factors such as model proliferation, which tended to put pressure on already narrow retail mark-ups. But whatever the cause, the effect was clear—and serious.

In Chrysler's case the effect was deadly serious. As a result of recent investment in research, production and manufacturing facilities which Quinn estimated at over nine hundred million dollars, *see* Exhibit P-8, Chrysler in 1962 had a production capacity of 1.3 million cars a year, while its unit sales had declined from a 1955 high of 1,206,195 to 311,899 and from a high of 21.8% of industry sales in 1951 to about 11%. *See* Quinn Memorandum, Exhibit P-7. Quinn's memorandum discloses that as of June 30, 1961, Chrysler had about two thousand open retail points where retail dealers should be located but were not, including 753 open Dodge points. He estimated that the open points represented a loss of sales of 150,000 units a year. He also pointed out that many existing dealers were falling short of Chrysler's estimate of market potential for their point of sale and that this resulted in a sales shortfall of 310,000 units. Thus an inadequate retail dealer network produced a shortfall in sales of between 400 and 500 thousand units, which, as the decline in Chrysler's percentage of total industry sales showed,[6] had been di-

6. *See* Plaintiff's Exhibit P-6; Chrysler Corporation, Financial and General Fact Book, Chart on The Competitive History of the Automobile Industry as shown by New Passenger Car Registrations.

verted to its manufacturing competitors. Moreover, the percentage of Chrysler dealers who operated at a loss was substantially higher than for the automobile industry as a whole. Quinn's memorandum concluded that the profit record of automobile dealerships as a whole and of Chrysler dealers in particular would preclude resort solely to private venture capital in order to replace unsatisfactory dealers and that, to fill the essential new points then open, Chrysler would have to use its own resources.

Investment by automobile manufacturers in retail dealers was not in 1961, an unheard of phenomenon. This court accurately summarized the DE program in *Coleman Motor Co. v. Chrysler Corp.*, 525 F. 2d 1338, 1341 (3rd Cir. 1975):

> Prior to 1954, Chrysler followed the conventional practice of marketing its automobiles through independent franchised dealers for resale to the public. In 1954, Chrysler began to franchise dealers as well under the Dealer Enterprise (D.E.) Plan. Under this plan, Chrysler supplied up to 70 percent of the capital needed to finance a new dealership. The plan, similar to those previously adopted by General Motors and Ford, provides that the 25 percent owner becomes president and general manager of the dealership and that he ultimately may purchase Chrysler's entire interest in the dealership out of his share of profits. Until such time, however, Chrysler retains majority control at the shareholder and board of directors levels.

In 1961, however, something more was needed. Quinn suggested certain refinements of the DE program, chief of which was the availability of an escrow fund as a method of accumulating out of profits to the credit of an

operator his 25% share of the investment. The DE program was not the only program under consideration, however. Quinn calculated that to fill in the two thousand open retail points and to replace or revitalize the dealerships which were falling short of sales potential for their points, Chrysler would in addition have to resort to a combination of steps, including the purchase and lease to dealers of retail facilities, the guarantee of dealer leaseholds, the provision of capital loans to dealers, and the absorption of the start-up expenses of new dealerships. He estimated that the total cost of repairing the two major deficiencies in the dealer organization—open points and lost sales dealers—would include capital costs of $122,600,000, expenses of $42,800,000, and contingent liabilities on lease guarantees of $118,500,000. He also recognized that an attempt to make such an investment quickly would be both wasteful and ineffective by reason of the control which the sales-ownership ratio (the ratio in which owners of one brand of car repurchase the same brand) exercises over the rate of volume increase. Thus he projected that a period of up to ten years would be required to accomplish the necessary restructuring of the Chrysler retail dealer network. He suggested proceeding in selected market areas with annual appropriations of $10,000,000 for capital expenditures, $4,000,000 for expense and $10,000,000 for contingent liability in the 1962, 1963, and 1964 model years.

Quinn's suggested program was adopted by Chrysler. However, Exhibits P-7 and P-8 make clear that Chrysler's first choice remained resort to retailers owned by private venturers, with the Quinn program operating only as a supplement.[7]

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7. That the expanded DE program was intended only as a temporary, supplemental program is evidenced most by statements by Quinn himself in Plaintiff's Exhibit P-7:

II

Glauser Dodge: History and Competition From DE Dealers

Glauser Dodge opened a private venture capital Dodge dealership in Vineland, New Jersey, in 1964. The dealership was conducted by Martin B. Glauser and his three sons. It was originally programmed by Chrysler to sell approximately 111 new vehicles per year. However, Glauser Dodge quickly exceeded that sales goal by more than 200%, becoming the largest private venture capital Dodge dealer in Southern New Jersey. It expanded its operations from one to three facilities in Vineland, acquired a five-acre tract of land for a new consolidated facility, and in December of 1968 began construction of that new facility. The new facility cost $315,000, of which $260,000 was provided by a bank loan. Glauser Dodge contends, and Chrysler disputes, that Glauser Dodge's operations were both high volume and profitable until 1969.

In 1964, when Glauser Dodge commenced business, Chrysler had already embarked on the process of filling in points in Southern New Jersey pursuant to the Quinn program. One DE dealership, Crescent Dodge, was already in operation at Collingswood, Camden County, New Jersey, more than 35 miles from Vineland. In 1965 a second DE dealership, Cherry Hill Dodge, was established at Cherry Hill, Camden County, New Jersey, about 35 miles from Vineland. Martin Glauser became the DE manager of Cherry Hill Dodge, while his sons continued to manage Glauser Dodge. After Martin Glauser's death in 1966,

7. (Cont'd.)
In all instances in which Chrysler invests its capital the goal is the ultimate buyout of that dealership by the dealer operator and his eventual owning it in total.
Chrysler Motors Corporation has no desire to be in the automobile retail business.

another DE manager was substituted at Cherry Hill. The new manager completed a buyout of Chrysler's interest in January, 1972. In 1967 Chrysler opened two additional DE dealerships—Cinnaminson Dodge at Cinnaminson, Burlington County, New Jersey, approximately 45 miles from Vineland, and Black Horse Dodge at Mt. Ephraim, Camden County, New Jersey, 31 miles from Vineland. Also in 1967 Chrysler closed out Crescent Dodge at Collingswood, which in the four years of its operations had never achieved a net profit. The DE manager at Cinnaminson bought out Chrysler's interest on June 1, 1970. Black Horse Dodge was purchased by its manager in 1974, after the verdict in this action. Thus, at the time of trial in the District Court, of the four DE dealerships which could have had an impact on Glauser Dodge's business or property, one had been closed, two had, pursuant to a DE purchase contract, been converted to private dealerships, and the fourth was operated by a manager who held a DE purchase contract.

In September, 1969, with its new facility ready for a grand opening, Glauser Dodge was experiencing cash flow problems. Chrysler Realty declined to act on a possible purchase and lease-back of the new facility. Chrysler Credit, which financed automobile loans for Glauser Dodge on a recourse basis, increased its repossession rate on defaulted retail paper at about that time and demanded repurchase, thus further aggravating Glauser Dodge's cash flow problems. In March, 1970, three Glauser Dodge checks were returned for insufficient funds and an inventory check by Chrysler Credit showed that Glauser Dodge had sold cars on which a floor plan inventory loan was outstanding without accounting for the proceeds of sale. It was, in the parlance of the industry, out of trust. Although Glauser Dodge contended that various Chrysler

subsidiaries owed it approximately the amount which it owed to Chrysler Credit, Glauser assigned to Chrysler Credit a mortgage on the new facility and turned over as additional security titles to previously unencumbered cars. It also obtained a $60,000 bank loan, out of which it made payments to creditors. Finally, it endeavored to obtain from Chrysler a guarantee of a proposed lease if outside investors would buy the facility and lease it back to Glauser. Chrysler declined to guarantee the lease because the rental was in its view too high for the planning potential for Vineland. The cash flow difficulties continued and, in July, 1970, Chrysler Credit repossessed Glauser Dodge's entire automobile inventory. Chrysler Credit then disposed of both the new and used car inventories at a loss. Hence, Glauser Dodge was out of business on July 31, 1970.

III

Glauser Dodge's Antitrust Action

Glauser Dodge commenced this action in August, 1970, charging Chrysler with violations of the Robinson-Patman Act [8] and Sections 1 and 2 of the Sherman Act [9] in the operation of the DE program, which, it alleged, discriminated against private venture capital dealers. Chrysler answered and Chrysler Credit Corporation filed a counterclaim for the balance due it. Chrysler Credit Corporation moved for summary judgment on the counterclaim and obtained a judgment of $205,719.12, which was affirmed by judgment order on May 16, 1973.[10] The case went to trial on Glauser Dodge's antitrust claims on Feb-

8. 15 U. S. C. § 13 (1970).

9. 15 U. S. C. § 1 and 2 (1970).

10. Martin B. Glauser Co. v. Chrysler Corp., 478 F. 2d 1399 (3d Cir. 1973).

ruary 14, 1974. Throughout the trial, Glauser Dodge pressed the Robinson-Patman Act and the Sherman Act § 2 attempt to monopolize claims. At the end of the entire case, however, it abandoned these legal theories with prejudice, and the case was submitted to the jury solely under Section 1 of the Sherman Act.

Glauser Dodge's Section 1 theory, which was accepted by the District Court in its charge to the jury, was that several Chrysler corporate enterprises conspired with each other to restrain trade in relevant product and geographic markets [11] and that the restraints injured Glauser Dodge in its business or property. The crux of Glauser Dodge's antitrust claim is that it was unable successfully to compete because the DE dealers received benefits from Chrysler which were not available to Glauser. The District Court's charge to the jury outlined Glauser Dodge's claims: [12]

> (P)laintiff . . . complains that the Chrysler defendants combined or conspired in restraint of trade or commerce by adopting and pursuing the following course of conduct:
>
> A. The creation and maintenance of better financed dealer enterprise dealerships for the purpose of penetrating the automobile market in which DE dealers competed with the plaintiff to its loss;
>
> B. Permitting DE dealers or factory stores to operate regularly in an out of trust condition and not so with Glauser;

11. The relevant product market alleged by Glauser Dodge to be affected by the conspiracy consisted of the wholesale and retail markets for Dodge automobiles. The relevant geographic market consisted of counties in Southern New Jersey and in the Philadelphia area.

12. Since counsel for Glauser Dodge explicitly approved the District Court's charge to the jury, we are justified in quoting that charge as a summary of plaintiff's antitrust theory.

C. Advertising and selling cars through factory controlled outlets or DE dealers at prices which were lower than independent retail dealers, such as the plaintiff, could afford to charge.

D. Requiring private capital dealers, such as the plaintiff, to guarantee retail commercial paper while permitting competing DE dealers to sell such paper to Chrysler Credit without recourse;

E. Refusing to deliver when properly ordered new vehicles to the plaintiff in time for its opening, even though an ample number of such vehicles were delivered to the DE dealers with whom the plaintiff competed;

F. Effectively limiting by the use of recourse retail paper and other restrictions upon the plaintiff's credit the plaintiff's ability to participate in contests and specials on the same basis as competing DE dealers; and

G. Providing superior physical facilities to DE dealers on terms which were not available to the competing private capital dealers such as the plaintiff Glauser.

The evidence offered in support of Glauser Dodge's Section 1 theory of recovery was in some respects undisputed and in other respects hotly contested.

There is no serious dispute over the fact that the four DE dealers in Southern New Jersey received financing from Chrysler which the plaintiff did not receive. Chrysler Realty acquired facilities for these dealers and leased them on terms which were not offered to Glauser Dodge and which the jury could have found were unavailable to

the latter from private real estate developers. Chrysler Credit Corporation purchased retail installment sales contracts from DE dealers on a without recourse basis, while its arrangement for purchases of such paper from Glauser Dodge required repurchase of defaulted installment contracts. As contemplated by the Quinn program, Chrysler absorbed some of the annual losses involved in the start-up of DE dealers, but did not do so for Glauser Dodge. Chrysler Credit permitted some DE dealers to operate in an out of trust condition when they were experiencing cash flow problems, but declined to extend this accommodation to Glauser Dodge when it went out of trust. Each of these activities, which amounted to a Chrysler capital investment or expense at a DE retail point, was contemplated by the Quinn program, which also contemplated, whenever possible, reliance on private venture capital dealers such as Glauser Dodge.

Aside from these largely undisputed matters, Glauser Dodge produced evidence tending to show that DE dealers sometimes advertised for sale and sold cars at prices which were lower than private venture capital dealers, such as the plaintiff, could afford to charge. Chrysler denied that this was a regular practice and produced evidence that it took steps to halt low-price advertising by Cherry Hill Dodge, the dealer on which most of the plaintiff's price evidence centered. Also contested was Glauser Dodge's contention that for the 1969 Announcement Day, when new models were introduced, the DE dealers received many new cars while it received few. Looking at the contested evidence in the light most favorable to the plaintiff, the jury could have found that the DE dealers did subject private dealers to intense price competition and that the DE dealers obtained better deliveries for the 1969 Announcement Day.

After outlining Glauser Dodge's contentions as to the objects of the conspiracy,[13] the District Court submitted four interrogatories to the jury:

> 1. Did any of the defendants enter into any combination or conspiracy in unreasonable restraint of trade or commerce?
>
> Answer yes or no.
>
> 2. If your answer to Question 1 is yes, then which defendants did combine or conspire. . . .
>
> 3. If your answer to Question 1 is yes, then was the plaintiff Glauser Dodge injured as a proximate result of such a combination or conspiracy.
>
> Answer yes or no.
>
> 4. If your answer to Questions 1 and 3 are yes, state the amount of damages. . . .[14]

The Court's charge permitted the jury to answer question 1 affirmatively if it accepted one of the seven Glauser Dodge theories outlined above. The charge permitted the jury to answer question 3 affirmatively if it found

> that plaintiff measurably competed with Dodge DE dealers in selling new Dodge vehicles in a relevant market and that Glauser was injured as a proximate result thereof. . . .[15]

13. *See* pp. 11-12 *supra*.

14. Joint Appendix to Parties' Briefs, Vol. II, at p. 03339.

15. *See* Joint Appendix for Parties' Briefs, Vol. II, at p. 03357. In the Court's charge, measurable competition in a relevant geographic market was defined thus:

> If you find that the plaintiff had the capacity and the knowhow to compete with the defendant's DE dealers for sales and in fact advertised and attempted to gain measurable sales in any of the market areas in which any of the Dodge DE dealers made measurable sales, you may find that the plaintiff was in competition with such a store or stores. Also, if you find that any of the Dodge DE dealers made or through advertising or otherwise attempted to make measurable sales in areas in which the plaintiff made or attempted to make measurable sales, you should find that there was competition.

Joint Appendix, *supra*, at p. 03354. Later in the charge, the Court stated that:

> (t)he test is simply whether the combination affects a definable market and whether it restrains an appreciable part of the trade in that market. The geographic area selected must, therefore, correspond to the commercial realities of the industry and be significant in an economic sense.

Joint Appendix, *supra*, at p. 03356.

The existence of a relevant product market was to be determined by the jury under this charge:

> A manufacturer's product may constitute a relevant product market if competition has developed around it as a separate economic entity recognized by the manufacturers, by the competitors, and by consumer purchasers.
>
> • • •
>
> In this case the plaintiff claims that there is a separate wholesale market for new Dodge automobiles, that dealers who purchase Dodges for resale are not really free to substitute automobiles of another manufacturer if they find themselves in difficulty with Dodge, and that there is also a definable sub-market consisting of present Dodge owners for the retail sale of Dodge automobiles.
>
> The defendant, on the other hand, claims the only relevant product market is the market shared by all new automobiles and that competition in such a market could not be adversely affected by the acts complained of.
>
> Therefore, in considering this case, one of the issues which you must decide is whether there is a separate market for the wholesale or retail sale of new Dodge automobiles in Southern New Jersey or Philadelphia which could have been adversely affected by the combination or conspiracy complained of.

Joint Appendix, *supra*, at pp. 03355-57.

The jury answered these interrogatories affirmatively and returned a verdict against the defendants, finding that they had entered into a conspiracy in unreasonable restraint of trade. Damages were assessed at $1,300,000, which amount was trebled to $3,900,000. The defendants filed timely motions for judgment notwithstanding the verdict and for a new trial. On August 20, 1976, the District Judge filed an opinion stating that he would deny

these motions if plaintiff would correct an error of $67,075 in the damage assessment by filing a remittitur of $201,225. Glauser Dodge filed the remittitur and the District Court denied defendants' post-trial motions. This appeal followed.

IV

Legal Analysis of Sherman Act § 1 Claim.

In order to sustain a cause of action under § 1 of the Sherman Act, the plaintiff must prove: (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy. Because we conclude that the defendants' activities were not illegal under § 1 of the Sherman Act—i.e. they did not constitute an unreasonable restraint—we need not decide the first, second, and fourth issues outlined above. For purposes of our analysis of the legality of the defendants' behavior, then, we will assume that the defendants combined or conspired with each other [16] and that the jury properly identified relevant product [17] and geographic [18] markets.

16. Chrysler argues that we should hold that a corporation cannot conspire with its vertically aligned subsidiaries since such a conspiracy introduces no new factor into the competitive situation. Chrysler concedes, however, that its position is foreclosed by this court's holdings in Cromar Co. v. Nuclear Materials & Equip. Corp., 543 F. 2d 501, 511-12 (3d Cir. 1976), and in Coleman Motor v. Chrysler Corp., 525 F. 2d 1338 (3d Cir. 1975). Adopting Chrysler's view would require reconsideration of those authorities by the court in banc.

17. Glauser Dodge argues that because of the importance of maintaining intrabrand competition, see Coleman Motor Co. v. Chrysler Corp., 525 F. 2d 1338, 1347 (3d Cir. 1975), this court should recognize a *wholesale* Dodge market as the relevant product market. Glauser argues that since Dodge dealers buy only Dodge vehicles from the manufacturer, there is a total lack of cross-elasticity of demand at the wholesale level. In addition, Glauser argues that due to monetary investments and goodwill, the dealers themselves cannot easily switch to another brand of automobiles for distribution. Finally, Glauser emphasizes that Chrysler Credit was the only entity to which it could sell substantial amounts of retail paper, thereby strengthening its ties to Chrysler. Without expressing an opinion on the merits of this argument, we point out that a similar argument was accepted by the district court in Joe Westbrook, Inc. v. Chrysler Corp., 429 F. Supp. 824 (N. D. Ga. 1976).

Glauser Dodge also argues that this court should recognize a relevant retail market limited to new Dodge vehicles. In support of this argument, Glauser relies on testimony with regard to Dodge's conquest and loyalty rates. *See* Joint Appendix to Parties' Briefs, at pp. 2132-36 (50% of new car buyers purchase the same make car as that which they previously owned).

Chrysler argues that the individual Dodge brand of automobiles cannot constitute a separate product market for purposes of a § 1 inquiry. Chrysler relies primarily on Mogul v. General Motors Corp., 391 F. Supp. 1305 (E. D. Pa. 1975), *aff'd*, 527 F. 2d 645 (3d Cir. 1976), and Coleman Motor Co. v. Chrysler Corp., 525 F. 2d 1338, 1349 (3d Cir. 1975). Those cases did not decide this issue, however, since the passages referred to dealt not with § 1 cases, but with § 2 attempt to monopolize cases. As noted above, we find it unnecessary here to resolve the product market issue within the context of § 1 of the Sherman Act.

18. The determination of a relevant geographic market is normally a question of fact for the jury. *See* Acme Precision Products, Inc. v. American Alloys Corp., 189 F. Supp. 153, 192 (S. D. N. Y. 1960).

19. The standard for reviewing a denial of a motion for judgment notwithstanding the verdict is whether, considering the evidence in the light most favorable to the party against whom the motion was made, there is sufficient evidence to support the jury verdict. *See* Coleman Motor Co. v. Chrysler Corp., 525 F. 2d 1338, 1344 (3d Cir. 1975); Andrews v. Dravo Corp., 406 F. 2d 785, 789 (3d Cir. 1969).

Reasonableness of the Restraint Under § 1 of the Sherman Act [19]

Unless the particular restraint falls within a category that has been judicially determined to be illegal per se,

the legality of a restraint challenged under § 1 of the Sherman Act must be assessed under the rule of reason. *See United States v. Standard Oil Co.*, 221 U. S. 1, 60 (1911); *Coleman Motor Co. v. Chrysler Corp.*, 525 F. 2d 1338, 1344 (3d Cir. 1975); *Mt. Lebanon Motors, Inc. v. Chrysler Corp.*, 283 F. Supp. 453, 456 (W. D. Pa. 1968), *aff'd on other grounds*, 417 F. 2d 622 (3d Cir. 1969). The rule of reason standard is equally applicable to restraints affecting intrabrand competition, such as that alleged here, as it is to restraints affecting interbrand competition. *See Coleman Motor Co. v. Chrysler Corp.*, 525 F. 2d 1338, 1344, 1346 (3d Cir. 1975).[20] Under the rule of reason standard, only those restraints upon interstate commerce which are unreasonable are proscribed by Section 1 of the Sherman Act. In *Chicago Bd. of Trade v. United States*, 246 U. S. 231, 238 (1918), Justice Brandeis' opinion for the Court outlined the analysis which must be undertaken in order to determine whether a particular restraint is unreasonable and therefore unlawful:

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

20. Chrysler argues that the Supreme Court's recent decision in Continental T. V., Inc. v. GTE Sylvania, Inc., 45 U. S. L. W. 4828 (U. S. June 23, 1977), altered the weights to be given to interbrand and intrabrand competition within the rule of reason test and, consequently, that *Sylvania* mandates the entry of a judgment notwithstanding the verdict in the instant case. We do not agree that judgment n.o.v. is appropriate on that ground. By overruling United States v. Arnold Schwinn & Co., 388 U. S. 365 (1967), the *Sylvania* decision eliminated a formalistic distinction under which certain territorial restrictions in the vertical distribution of the product were analyzed under the rule of reason standard, while others were labelled per se violations of § 1. *Sylvania* held that all such vertical territorial restrictions would be evaluated under the reasonableness inquiry. The Court's discussion of the significance of intrabrand and interbrand competition was intended merely to illustrate the error of *Schwinn's* formalistic distinction. It was not intended to affect the analysis under the rule of reason test.

For purposes of our analysis here, the critical part of Justice Brandeis' opinion is its discussion of the role that the defendant's *intent or purpose* plays in the rule of reason test. The ultimate test of legality, of course, is whether the particular restraint promotes or impairs competition. But, as Justice Brandeis' opinion recognized, the intent or purpose underlying the restraint is a crucial variable in aiding the court to assess the competitive effects of the restraint.

Two prior decisions of this Circuit—*Coleman Motor Co. v. Chrysler Corp.*, 525 F. 2d 1338 (3d Cir. 1975), and *Rea v. Ford Motor Co.*, 497 F. 2d 577 (3d Cir. 1975)—considered the DE programs in automobile distribution.

In *Rea*, a privately capitalized Ford dealer sued Ford Motor Company (the manufacturer) charging that Ford's subsidization of its wholly-owned dealerships constituted an unreasonable restraint of trade in violation of Section 1

of the Sherman Act.[21] The plaintiff introduced expert testimony that calculated plaintiff's damages as equal to the average subsidy per car provided to the Ford-owned dealerships times the number of cars sold by the plaintiff. In rejecting this theory, we held that the mere proof of a subsidy from the manufacturer to DE dealerships for the purpose of increasing market penetration did not establish a recoverable injury to a competing dealer under § 4 of the Clayton Act. 479 F. 2d at 587-70. The *Rea* case did not rule out the possibility that a manufacturer could be liable for antitrust violations committed in their operation of retail outlets. *Id.* at 590. However, since the plaintiff there had not suffered an injury recoverable under the antitrust laws, the *Rea* court found it unnecessary to consider the legality of the manufacturer's distribution system under § 1 of the Sherman Act.[22]

This Court in *Coleman* considered the same DE program, albeit in a different geographic market, as that presented in the instant case. In that case, the plaintiff averred that Chrysler's activities were "*intended* to achieve a Dodge sales structure composed primarily or entirely of several large Chrysler-owned dealerships." [23] Reviewing the evidence for possible jury findings, we concluded that "the jury could have concluded that Chrysler had accomplished its purposes of increasing Dodge sales and con-

21. Plaintiff's suit in *Rea* was not based solely on Section 1 of the Sherman Act. On the contrary, plaintiff also alleged violations of the Robinson-Patman Act, Section 3 of the Clayton Act (15 U. S. C. § 1221 et seq.), and the common law of contracts.

22. The opinion in *Rea* stated explicitly that it was not deciding the question whether the manufacturer's activities violated § 1 of the Sherman Act:

> Ford has advanced a number of arguments why the verdict against it on this claim is erroneous and should be set aside. However, it is necessary for us to consider only one which we find meritorious and dispositive of this claim.

497 F. 2d at 589.

23. 525 F. 2d at 1343.

solidating retail sales in the hands of several strong Chrysler-controlled dealerships." [24] Since it found trial errors, the Court remanded the case for a new trial.

The opinion in *Coleman* suggests for present purposes the parameters of lawful activity under Section 1 of the Sherman Act. More specifically, although the *Coleman* Court acknowledged that the ultimate concern of the Sherman Act is with effects, not intent,[25] the opinion also relied, in large part, upon the purpose the jury could have found to underlie the DE program in the relevant market as a tool for gauging the competitive effects of that program within that market. Thus, *Coleman* teaches us that predatory activities which have the purpose of consolidating sales of a manufacturer's products in its wholly or partially owned dealerships may produce anti-competitive effects violative of the Sherman Act. In recognizing that restraints on intrabrand competition are cognizable under Section 1 of the Sherman Act, *Coleman* reasoned that forward vertical integration in the automobile distribution system could eliminate competition among dealers of the same brand within a $200-300 per vehicle price jurisdiction, which arises because non-price factors enter into consumers' decisions to purchase automobiles. In addition, the court stated that vertical integration could adversely affect competition among dealers with regard to repair services.[26] In an oligopolistic industry such as automobile manufacturing, intrabrand competition among dealers of a single brand may be highly significant to the consumer.[27] Thus, restraints designed to achieve forward

24. *Id.* at 1346.

25. *Id.* at 1345 n. 10.

26. *Id.* at 1347.

27. *See* Note, *Vertical Integration as a Restraint on Intrabrand Competition: The Automobile Industry,* 17 B. C. Indus. & Com. L. R. 871, 875-79 (1976).

vertical integration may be found to be unreasonable. But in the absence of either a purpose to integrate vertically or such an operative effect, steps taken by a car manufacturer to enhance its market penetration against its manufacturing competitors can only enhance interbrand competition and must be deemed to be lawful. In addition, where the manufacturer's intent is not to maintain ownership of the dealer, but to sell its interest to the private manager, the eventual effect is an increase in the number of private dealers of that automobile brand and thus an enhancement of intrabrand competition. The rejection in *Coleman* of Chrysler's contention that it was entitled to a judgment n.o.v. rather than a new trial is no more than a holding that on the record in that case a jury could have found a purpose or operative effect of forward vertical integration by the elimination of independent dealers in the geographic and product market there considered.

This interpretation of *Coleman* is consistent with the Ninth Circuit's opinion in *England v. Chrysler Corp.*, 493 F. 2d 269 (9th Cir. 1974). That case also involved a challenge to Chrysler's DE program based on § 1 of the Sherman Act. In affirming the district court's granting of a judgment notwithstanding the verdict in favor of the defendant, the Ninth Circuit court stated that in order to prevail, the plaintiff must prove that the defendant's "conduct was deliberate." 493 F. 2d at 273. The Court elaborated:

> To be deliberate does not mean there must be specific intent to produce the unreasonable economic effect (e.g., to "squeeze" Sunset). It means that there must be evidence from which it may at least be inferred that the conspirator determined upon the *course* of conduct, as opposed to the result.

> In this context, Chrysler's conduct would be deliberate if it could be inferred that Chrysler determined to manage Van Ness regardless of retail profit.

Id. (emphasis in the original). As this language suggests, intent or deliberateness can be proved by showing that the defendant has determined upon a course of conduct which in turn is likely to have anti-competitive effects.[28]

Having discussed what we consider to be the controlling precedent in this area, we turn now to an assessment of the circumstances of the present case. Although the first of the seven objects of the defendants' conspiracy listed in the charge referred to financing DE dealers "for the purpose of penetrating the automobile market in which DE dealers competed with the plaintiff to its loss", *see* p. A46 *supra*, the court's instruction did not require that the jury find that Chrysler had the purpose or its programs the actual effect either of concentrating sales of Dodge products in the hands of Chrysler-controlled dealerships or of limiting in any way the role of private venture capital dealerships in the distribution of Chrysler products. It is understandable that no such charge was given, for there is no evidence tending to support such a conclusion. The undisputed evidence is to the effect that each of the four DE dealerships was intended by Chrysler to become a private capital dealerships through the normal operation of the contracts with DE managers. Nor can it be inferred from the record in this case that Chrysler operated the DE dealers in disregard of retail profit. During the period when the Quinn program was in operation, Chrysler franchised Glauser Dodge as a new private venture capital dealer. Of the four DE dealerships complained of, one

28. This interpretation of *Coleman* and *England* has recently been accepted by the district court in Elfman Motors, Inc. v. Chrysler Corp., No. 72-1282 (E. D. Pa. August 9, 1977).

was teminated when it failed to achieve profitability, two had been converted to private ownership at the time of trial, and the fourth was subject to a contract providing for such conversion.[29] Finally there is no evidence from which the jury could have found thta Glauser Dodge was a lost sales dealership which under the Quinn program was slated for replacement. The record requires the conclusion that the dealer support program outlined in Exhibits P-7 and P-8 was intended by Chrysler as a temporary and supplemental means of bolstering a defective private dealer network and not as a means for forward vertical integration into automobile distribution.[30] Thus, the potential for anti-competitive effects which we found to be significant in *Coleman* is absent here. Accordingly, *Coleman* does not compel a judgment for the plaintiff in this case.

Since *Coleman* does not control the outcome in this case, we must confront the more expansive theory advocated vigorously by Glauser Dodge. Under that theory, whenever a manufacturer subsidizes retail dealers in order to maximize its manufacturing profits by increasing its market penetration, there is an anti-competitive injury to any dealers who compete with the subsidized dealers. Glauser Dodge's counsel explained the full thrust of its theory when at oral argument on this appeal he explained:

> I think that a General Motors dealer could have complained about it. I think a Ford dealer could have

29. As stated earlier, *see* p. A44 *supra*, the fourth DE dealer—Black Horse Dodge—was purchased by its manager in 1974, after the trial verdict in this case.

30. The only evidence that even remotely supports a *Coleman* violation is the hotly disputed evidence with regard to the deliveries for the 1969 opening. In light of the overwhelming evidence that the purpose and actual operation of the DE program was not to integrate vertically, this single, contradicted piece of evidence is simply not sufficient to support the jury's verdict.

> complained about it. Anybody who had to compete in this market with the type of conduct that was involved here would have a complaint under the antitrust laws.[31]

To the extent that Glauser Dodge claims an injury based solely on the loss subsidy theory, its claim is clearly foreclosed by our decision in *Rea v. Ford Motor Co.*, 497 F. 2d 577, 590 (3d Cir. 1974). However, to the extent that Glauser Dodge claims an injury other than loss subsidies, we are compelled to address the question left unanswered by this court in *Rea*—i.e. whether a manufacturer's subsidization of its partially or wholly owned dealerships for the purpose achieving market penetration violates Section 1.

In this case, the evidence was that the subsidy took the form of capital investments, absorption of start-up expenses, and favorable credit arrangements. But plaintiff's theory of injury to competition would be equally applicable to any form of subsidy. Moreover, the effect on competition would be the same if the subsidies of which Glauser Dodge complaints came from a source other than Chrysler. For example, if, instead of Chrysler's investments, the four DE dealers had obtained more favorable lines of credit with banks and higher private venture capital investment, their ability to subject the plaintiff to intense price competition would be the same. Elimination of such competition cannot be the object of Section 1 of the Sherman Act. *Cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690, 45 U. S. L. W. 4138 (U. S. Jan.

31. Transcript of Oral Argument, Glauser Dodge Co. v. Chrysler Corp., September 9, 1977, at p. 32.

It should also be noted that this theory is not consistent with the premise that the relevant product market should be restricted to Dodge dealers.

25, 1977). Yet all that distinguishes the instant case from that of the hypothetical better-financed private dealer is the source of the financing and the motive-market penetration—of the financing manufacturer. The fact that the source of the subsidy is the manufacturer itself, we conclude, does not under a rule of reason analysis of the facts, bring this case within the reach of Section 1 of the Sherman Act. The object of the antitrust laws is the enhancement of competition, while in essence Glauser Dodge argues that it is entitled to be insulated from competition encouraged by a manufacturer. Absent forward vertical integration whose purpose or actual operation is to concentrate Dodge sales in the hands of the Chrysler-owned dealers, the subsidies have a pro-competitive effect, at both the intrabrand and the interbrand levels. Accordingly, the motion for judgment notwithstanding the verdict should have been granted.

The judgment appealed from will be reversed.

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 76-2390 and 77-1188

MARTIN B. GLAUSER DODGE CO.

v.

CHRYSLER CORPORATION
CHRYSLER MOTORS CORPORATION
CHRYSLER FINANCIAL CORPORATION
CHRYSLER CREDIT CORPORATION
CHRYSLER REALTY CORPORATION,
Appellants

(D. C. Civil No. 1077-70)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: GIBBONS, WEIS and GARTH, *Circuit Judges*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on September 9, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, entered September 8, 1976 and January 7, 1977, be, and the same are hereby reversed. Costs are taxed against appellee.

ATTEST:

THOMAS F. QUINN
Clerk

November 14, 1977

Certified as a true copy and issued in lieu of a formal mandate on December 22, 1977.

Test: THOMAS F. QUINN
Clerk, United States Court of Appeals for the Third Circuit

Costs taxed in favor of appellants as follows:

Brief & Supp. Appx.	$ 4,291.02
Appendix	5,860.99
Supp. Brief	524.76
Reply Brief	904.40
Clerk's Fees	100.00
TOTAL	$11,681.17

APPENDIX D.

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 76-2390 and 77-1188

MARTIN B. GLAUSER DODGE CO.,
Appellee

v.

CHRYSLER CORPORATION
CHRYSLER MOTORS CORPORATION
CHRYSLER FINANCIAL CORPORATION
CHRYSLER CREDIT CORPORATION
CHRYSLER REALTY CORPORATION,
Appellants

(D. C. Civil No. 1077-70)

SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge*, ADAMS, GIBBONS, ROSENN, WEIS, GARTH and HIGGINBOTHAM, *Circuit Judges*

The petition for rehearing filed by MARTIN B. GLAUSER DODGE CO. in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of

the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

JOHN J. GIBBONS
Judge

Dated: December 14, 1977

Supreme Court, U. S.
FILED
APR 13 1978
DAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-1275.

MARTIN B. GLAUSER DODGE CO.,
Petitioner,

v.

CHRYSLER CORPORATION, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

ROBERT S. RYAN,
MICHAEL O'S. FLOYD,
DRINKER BIDDLE & REATH,
1100 PNB Building,
Philadelphia, Pa. 19107

WILLIAM E. REIFSTECK,
FARR, REIFSTECK AND WOLF,
a Professional Corporation,
Haddon Heights, N. J. 08035

Counsel for Chrysler Financial Corporation and Chrysler Credit Corporation.

JOHN P. HAUCH, JR.,
ARCHER, GREINER & READ,
a Professional Corporation,
Haddonfield, N. J. 08033

Counsel for Chrysler Corporation, Chrysler Motors Corporation and Chrysler Realty Corporation.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1275.

MARTIN B. GLAUSER DODGE CO.,
Petitioner,

v.

CHRYSLER CORPORATION, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Court of Appeals now is reported at 570 F. 2d 72, 1977 Trade Cases ¶ 61,725. The decision of the District Court is reported at 418 F. Supp. 1009.

QUESTION PRESENTED.

Did the United States Court of Appeals for the Third Circuit err in holding on the basis of the record in this case that a Chrysler "dealer enterprise" program which is used to finance the creation of new automotive dealerships where a private investor cannot be found and which permits the dealership manager to "buy out" Chrysler's interest in the dealership enhances competition and does not violate § 1 of the Sherman Act, 15 U. S. C. § 1.

STATEMENT OF THE CASE.

A. Proceedings Below.

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit reversing a judgment in a civil antitrust action. The petitioner, Martin B. Glauser Dodge Co. ["Glauser Dodge" or "Glauser"], a former automobile dealership located in Vineland, New Jersey, initiated the action against Chrysler Corporation ["Chrysler Corporation"], three of its wholly-owned subsidiaries—Chrysler Motors Corporation ["Chrysler Motors"], Chrysler Realty Corporation ["Chrysler Realty"], and Chrysler Financial Corporation ["Chrysler Financial"]—and Chrysler Credit Corporation ["Chrysler Credit"], a subsidiary of Chrysler Financial Corporation. For brevity this response will refer to the defendants collectively as "Chrysler".

The Glauser complaint initially included claims of monopolization and discrimination under the Sherman and Robinson Patman Acts. Glauser eventually abandoned these claims with prejudice, submitting its case to the jury solely under § 1 of the Sherman Act, 15 U. S. C. § 1. The jury returned a verdict against Chrysler in the amount of $1,300,000, trebled by the Court to $3,900,000. Chrysler's timely post-trial motions were denied by the District Court.[1] In January, 1977, the District Court entered an order increasing the judgment by attorney's fees and costs in the amount of $650,000. The Chrysler defendants appealed and on November 14, 1977, the Court of Appeals reversed the decision below and directed entry of judgment N. O. V. on the ground that the "dealer enterprise" program was not an unreasonable restraint of trade on this record. *Martin B. Glauser Dodge Co. v. Chrysler Corporation*, 570 F. 2d 72, 1977 Trade Cases ¶ 61,725 (3d Cir. 1977). Glauser's petition for rehearing was denied on December 14, 1977.

1. The Court ordered a minor remittitur, reducing the trebled judgment to approximately $3,700,000.

The petitioner is simply incorrect in its assertion that the Court of Appeals found no errors warranting a new trial.[2] It seems clear from the court's opinion that it never reached Chrysler's claims in this respect since it found that the Chrysler defendants were entitled to judgment N. O. V.

B. The Dealer Enterprise Program.

The record below is lengthy and the parties differ on the inferences and conclusions to be drawn from it. Glauser has set forth its view of the facts extensively in its petition. The contentions of the parties concerning the record are set forth in detail in their briefs before the trial court. These are reproduced in Volume 32 of the Appendix below, A6429-6802. A detailed reply to Glauser's claims concerning the asserted "conspiracies" and "discriminations" would be more appropriate to a brief on the merits than to a response to plaintiff's petition. A short

2. The petition is also incorrect in its assertion that what it terms the "far-fetched" theories of the Court of Appeals were not argued by Chrysler. See the petition at pages 37, 24. Throughout, Chrysler urged that the dealer enterprise program was not a method of forward integration, that it was pro-competitive, and that there was no evidence to support a finding that any Chrysler defendant intended to destroy Glauser Dodge or, indeed, that any action of the dealer enterprise dealerships had had that effect. Chrysler argued the points both before the trial court [see e.g., the Appendix below at A3438-50, A6488-99, A6515-30 and A6578-6604] and in the Court of Appeals [see e.g., Chrysler's main brief at pp. 7-9, 35-43, Chrysler's reply brief at pp. 6-12, 18-22, and Chrysler's supplemental brief at pp. 10-14].

description of the central facts seems more useful in the context of this petition.[3]

As the Court of Appeals noted, the manufacture of automobiles is a capital intensive industry. Historically, the industry has preferred to place its investment into manufacturing facilities, leaving the distribution of automobiles primarily to independently financed dealers. In a real sense, this leaves the manufacturer dependent for its sales on the coverage and success of its dealer network, and this is particularly true of Chrysler. If an independent investor cannot be found to open a dealership in an "open point" in the network—that is, a location where a dealership is needed, but is absent—then the sales in that area will be lost unless the manufacturer itself helps to finance the creation of a new dealership.[4] Accordingly, Chrysler

3. The so-called "discriminations" are described at App. A45-6. Item "A" represented an attack on the dealer enterprise program itself. Claims "B", "E" and "F" were denied and were met by showing that Glauser had been treated no differently than the dealer enterprise dealerships. On this record, "C" represented a claim that the dealer enterprise dealerships should have charged less competitive prices. See footnote 8, *infra*. As to Claim "D", Chrysler Credit established that "without recourse" financing was offered to the Camden area dealerships because it was available from other competitive sources in the immediate Philadelphia area, a position supported by documentation. Claim "G" faced uncontested evidence in Glauser's case that the dealer enterprise dealerships had paid rents equivalent to those charged by independent real estate owners. The charge permitted the jury to find against Chrysler if any claim were accepted (App. A48).

4. This is well illustrated by the evidence in this case. The Glauser dealership closed in July of 1970. Chrysler performed an audit of the sales invoices of Black Horse Dodge and Cherry Hill Dodge (the two DE dealerships nearest to Vineland) for the 18 month period immediately following the closing of Glauser dealership. This showed that the two dealerships sold only 20 vehicles during the 18 months (out of a total of 4351) to purchasers in Cumberland County where Glauser had made a majority of its sales. Since Dodge did not have a dealership in the Vineland area, most of the potential Dodge sales were simply lost.

has been forced to enter into the retail business through its "dealer enterprise" ("DE") program, for the only alternative is the loss of large markets by default. The Court of Appeals' discussion of this history and of Chrysler's need to strengthen its dealership network when its viability as an automobile manufacturer was threatened is found at App. A36-41.

Dealer enterprise dealerships are not utilized when a private individual can be found to open his own dealership. It simply is not in Chrysler's own interest to use its limited capital to invest in a dealership when other funds are available. But where a private investor cannot be found, Chrysler may be able to locate a manager who has ability, form a dealership corporation with the dealership manager as its president, and invest the capital—sometimes jointly with the dealership manager—needed to fund a new dealership. The dealership manager holds contractual rights to buy out Chrysler's interest in the dealership (App. A40-1). While the dealership manager controls day-to-day operations and sets prices, Chrysler retains majority control at the shareholder and board of director levels until the investment is bought out by the manager. If the dealership is unsuccessful, it is closed or sold. Profitable dealerships are bought out by the dealership manager (App. A40, A42-3).

C. Glauser and the Camden Area Dealerships.

The petitioner, Glauser Dodge, was a Dodge dealership located in Vineland, southern New Jersey. The dealership sold about 400 new automobiles per year, but it was either unprofitable or not very profitable.[5] Glauser

5. Glauser's operating statements, submitted to Chrysler, showed profits which averaged about $25,000 per year over the period 1964 to 1969. Its tax returns indicated that it lost money, as did its books which showed a deficit in the retained earnings account over the life of the corporation.

Dodge built a large new facility in 1968-1969 and ran into financial difficulties. By the fall of 1969, Chrysler Credit, which had been financing Glauser's inventory, ascertained that Glauser Dodge had overdrawn its bank account. In February, 1970, Chrysler Credit found that Glauser had sold a number of vehicles "out of trust," which means that it had sold vehicles and retained the proceeds without paying Chrysler Credit the sums borrowed by Glauser to finance the purchase of the same vehicles. In March of 1970, after discovering that Glauser had become involved in a check-kiting scheme (Appendix below at A1482-3, A1859-60), Chrysler Credit placed restrictions on Glauser's credit. In July of 1970 when the dealership was not able to pay its debts, Chrysler Credit repossessed Glauser's inventory and the dealership closed.

There were no dealer enterprise dealerships in or around Vineland, but there were four such dealerships located in the Camden area, 30 to 45 miles from Glauser's location (App. A42-3). One of these dealerships, Crescent Dodge, was unsuccessful and was closed in 1967. The other three dealerships, Cinnaminson Dodge (1970), Cherry Hill Dodge (1972)[6] and Black Horse Dodge (1974) were bought out by their respective dealership managers on the dates indicated in the parentheses, and became privately owned. The effect was to reinstate Dodge as a competitive factor in the Camden area.

Glauser's essential theory at trial was that the dealer enterprise dealerships were "subsidized" by Chrysler and that Glauser Dodge would not have failed absent their competition. Little of Glauser's evidence was directed against Chrysler Corporation itself and none against

6. There is some irony in the fact that Martin B. Glauser himself was the manager of Cherry Hill Dodge before his death in late 1966, a period during which Glauser complains of competition from that dealership. Petition at p. 15.

Chrysler Financial. Instead, most of Glauser's attacks were directed against Chrysler Motors, a sales subsidiary which then operated the dealer enterprise program, Chrysler Realty, a subsidiary which leased dealership facilities to dealers—both independently owned and dealer enterprise dealerships—and Chrysler Credit, a subsidiary of Chrysler Financial which made wholesale and retail financing available to Chrysler dealerships of all types.

At its core, Glauser's case was premised on the argument that DE dealerships (a) received subsidies in the form of services from Chrysler subsidiaries which were not profitable enough to be viewed as independent profit centers and (b) were enabled to lose money by virtue of Chrysler's investment in the dealerships. For example, Glauser urged that Chrysler Realty was not sufficiently profitable, that this meant that dealerships occupying Chrysler Realty facilities were "subsidized" and that Glauser was entitled to recover, as damages, an equivalent subsidy, which Glauser measured by the mortgage principal payments (and depreciation) which the dealer enterprise dealerships did not have to incur, or by the principal payments made (and depreciation taken) by Glauser with respect to its own facility. In the same vein, Glauser claimed that if Camden area "DE" dealerships lost money in any given year, it was entitled to divide that loss by the number of units sold by the dealerships (to determine a "per unit" subsidy) and to be credited by way of treble damages with an equivalent per unit subsidy on each of the units sold by Glauser.[7] The practical effect of this

7. This approach has the result of permitting a plaintiff to recover increasingly larger damages as the actual impact of competition from a DE dealership decreases. For an example, Dr. Kuehn, Glauser's expert, took the position that because Crescent Dodge "lost" overall an amount which averaged $187.50 per unit during 1964, Glauser Dodge was entitled to recover as a "subsidy" the same $187.50 per unit on each of the 352 units which Glauser sold,

approach is to bar the use of company financed dealerships, for if any losses suffered by a DE dealership must be paid in terms of a "subsidy" to all dealers within a 30-mile radius, then the program becomes financially unsupportable.

D. The Decision of the Court of Appeals.

The opinion of the Court of Appeals describes the dealer enterprise program (App. A36-41) and the history of Glauser Dodge and the Camden area DE dealerships (A42-3), analyzes Glauser's claims (A44-50) and the applicable decisions (A50-57), and concludes (a) that absent forward, vertical integration, the creation of new dealerships is pro-competitive (App. A56) and (b) that the fact that Chrysler provided financing for dealerships organized under the dealer enterprise program "does not under a rule of reason analysis of the facts, bring this case within the reach of Section 1 of the Sherman Act" (App. A60). In reaching these conclusions, the Court of Appeals applied the tenet that the "object of the antitrust laws is the enhancement of competition" and rejected the contention that petitioner was "entitled to be insulated from competition encouraged by a manufacturer" (App. A60).

7. (Cont'd.)

for an untrebled total of $66,000. Had Crescent Dodge been even less successful in 1964 and experienced an operating loss of $250 per unit, Glauser's damages under Dr. Kuehn's theory would increase to $88,000 ($250 × 352 units sold by Glauser). If one were to go further and assume that Glauser itself had been more successful and had sold 500 units during 1964, then its damages would be further increased because it would be entitled to receive 500 "subsidies" rather than only 352, so that its single damages would amount to $250 × 500 or $125,000. Accordingly, under Dr. Kuehn's subsidy theory, damages tend to increase as the DE dealerships are less successful, and that increase is compounded as the plaintiff dealership becomes more successful.

REASONS FOR DENYING THE WRIT.

General Motors began its "Motors Holding" program in 1929, but has made relatively less use of the program in recent years, because of the strength of its dealership body. Chrysler and Ford have had to make use of their dealer enterprise or "dealer development" (Ford's equivalent) programs, and have been involved in legal actions. At some risk of over-simplification, all contain at their core the argument that the company-created dealerships have been better financed and hence better able to spend more money for advertising, and charge lower prices for cars.[8] Four plaintiff's verdicts have produced opinions in the Courts of Appeals.

In *England v. Chrysler Corporation*, 493 F. 2d 269 (9th Cir.), *cert. denied*, 419 U. S. 869 (1974), the District Court granted Chrysler's motion for judgment N. O. V. The Court of Appeals for the Ninth Circuit affirmed, holding that if plaintiff's theory could be sustained on any ground,[9] the plaintiff could recover only if it showed that the competing DE dealerships had been managed with a reckless disregard for profit at the retail level. As the Court of Appeals noted:

> "Under Sunset's theory it is difficult to distinguish healthy from unhealthy competition, and mismanagement of a business from unreasonable, and therefore unlawful management. A business which through aggressive sales tactics intensifies competition is not

8. The claim is not one of below-cost pricing. The pricing contentions of petitioner are set forth on pages 15-16 of its petition. While the description is inaccurate in a number of respects, it illustrates that the claim is that the prices were too low, not that the DE dealerships were selling cars below cost. Petitioner's contentions notwithstanding, there was no evidence that any Chrysler defendant set the prices charged by DE dealerships.

9. The underlying liability question was reserved. See 493 F. 2d at 273.

to be lightly condemned. The competition it creates is not necessarily pernicious even if competitors are 'harmed' since competition is always hard on the contestants. Indeed, that is its benefit." 493 F. 2d at 273.

In *Rea v. Ford Motor Company,* 355 F. Supp. 842 (W. D. Pa. 1973), the District Court held that a jury could find Ford liable if it were to finance the opening of new dealerships at the retail level. The decision was reversed by the Court of Appeals for the Third Circuit on the ground that the lost "subsidy" theory of damages followed by the *Rea* plaintiff (and by Glauser in this case) was improper. *Rea v. Ford Motor Company,* 497 F. 2d 577 (3d Cir.), *cert. denied,* 419 U. S. 868 (1974). However, in *Coleman Motor Co. v. Chrysler Corporation,* 525 F. 2d 1338 (3d Cir. 1975), the court reversed a verdict for plaintiff and remanded the case for retrial under an opinion which could be read as indicating that a jury could find an antitrust violation if competition by a dealer enterprise dealership—clearly pro-competitive at the interbrand level—might have an adverse effect on competition at the intrabrand level. 525 F. 2d 1346-47.

There then existed a possibility of a conflict arising between the *Coleman* decision in the Third Circuit and the decision of the Ninth Circuit in the *England* case. Far from creating any conflict between the circuits, the decision of the Third Circuit in *Glauser* resolves that potential conflict. See App. at A56-7.

The opinion of the Court of Appeals assumes for the purposes of analysis only (App. A50) the existence of a conspiracy and proper identification of the relevant product and geographic markets, and turns then to the question whether Chrysler's conduct represented an unreasonable restraint of trade. After discussing the *Rea, Coleman* and *England* decisions, the opinion reviews

the evidence and concludes that the dealer enterprise program had neither the purpose nor the effect of concentrating Dodge sales at the retail level in the hands of DE dealerships.[10]

> "The undisputed evidence is to the effect that each of the four DE dealerships was intended by Chrysler to become a private capital dealership through the normal operation of the contracts with DE managers. Nor can it be inferred from the record in this case that Chrysler operated the DE dealers in disregard of retail profit. During the period when the Quinn program was in operation, Chrysler franchised Glauser Dodge as a new private venture capital dealer. Of the four DE dealerships complained of, one was terminated when it failed to achieve profitability, two had been converted to private ownership at the time

10. Petitioner claims that forward integration was achieved because "sales by factory controlled dealerships increased from 17% to 36% nationally and from 20% to 42.5% regionally over a seven year period." Petition, p. 2. If the figures are meant to apply to DE dealerships they are simply incorrect. The 36% figure refers not to dealerships in which Chrysler has an interest, but to all dealerships located in any facility owned by Chrysler Realty, including DE dealerships, former DE dealerships, and private capital dealerships which never were a part of the dealer enterprise program. Similarly, DE dealerships never achieved 42.5% of the Dodge sales in southern New Jersey. That figure can be reached only by counting sales of dealerships which had been bought out by the dealership manager and hence were no longer a part of the DE program.

An additional case is now pending before the Third Circuit Court of Appeals. In that case counsel were able to achieve significant stipulations of fact, which show that of the 20 dealerships located in the Philadelphia SMSA which were a part of the dealer enterprise program during any part of the period 1962-1969, nine were bought out by the dealership manager, two were sold to third parties, eight were closed as unsuccessful, and only one remained in DE status as of trial in February, 1977. The District Court's opinion granting Chrysler's motion for judgment N. O. V. is reported as *Elfman Motors, Inc. v. Chrysler Corporation,* 1977 Trade Cases ¶ 61,650 (E. D. Pa. 1977).

of trial, and the fourth was subject to a contract providing for such conversion. Finally there was no evidence from which a jury could have found that Glauser Dodge was a lost sales dealership which under the Quinn program was slated for replacement. The record requires the conclusion that the dealer support program outlined in Exhibits P-7 and P-8 was intended by Chrysler as a temporary and supplemental means of bolstering a defective private dealer network and not as a means for forward vertical integration into automobile distribution." App. A57-58, (footnote omitted).

Against the background of this record, then, the Court of Appeals was faced with a claim that creation of new dealerships was anti-competitive, even absent proof of vertical integration or reckless operation. It concluded that the dealerships had a pro-competitive effect on both interbrand and intrabrand levels.

> "In this case, the evidence was that the subsidy took the form of capital investments, absorption of start-up expenses, and favorable credit arrangements. But plaintiff's theory of injury to competition would be equally applicable to any form of subsidy. Moreover, the effect on competition would be the same if the subsidies of which Glauser Dodge complains came from a source other than Chrysler. For example, if, instead of Chrysler's investments, the four DE dealers had obtained more favorable lines of credit with banks and higher private venture capital investment, their ability to subject the plaintiff to intense price competition would be the same. Elimination of such competition cannot be the object of Section 1 of the Sherman Act. *Cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690, 45 U. S. L. W. 4138 (U. S. Jan. 25, 1977). Yet all that distinguishes the instant case from that of the hypothetical better-financed private dealer is the source of the financing and the motive—market penetration—of the financing manufacturer. The fact that the source of the subsidy is the manufacturer itself, we conclude, does not under a rule of reason analysis of the facts, bring this case within the reach of Section 1 of the Sherman Act. The object of the antitrust laws is the enhancement of competition, while in essence Glauser Dodge argues that it is entitled to be insulated from competition encouraged by a manufacturer. Absent forward vertical integration whose purpose or actual operation is to concentrate Dodge sales in the hands of the Chrysler-owned dealers, the subsidies have a pro-competitive effect, at both the intrabrand and the interbrand levels." App. A59-60.

Glauser's contention that the opinion below permits a manufacturer to integrate forward into the retail market willy-nilly (petition pp. 25-28) simply misreads the opinion below. Citing *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U. S. 36 (1977), Chrysler had argued in its supplemental brief that interbrand competition was the chief concern of the antitrust laws (see fn. 19 at 433 U. S. 52), that the DE program was strongly pro-competitive at the interbrand level (since it permitted Chrysler to remain as a viable competitor to Ford and General Motors in areas where dealerships could not be opened without an investment by Chrysler) and that injury to a competitive dealership of the sort discussed in the *Coleman* opinion at 525 F. 2d 1347 could not lead, consistent with *Continental*, to a holding that the dealer enterprise pro-

gram violated § 1 of the Sherman Act. The Court of Appeals rejected that argument (see fn. 20 at App. A52) and preserved the *Coleman* decision, limiting it to cases where the record would support the conclusion that the purpose or effect of factory-owned dealerships is to achieve permanent, vertical integration into the retail market.

Glauser attacks this "purpose or effect" analysis. See, e.g., Petition p. 23.[11] However, it is clear that the Court of Appeals held that the creation of DE dealerships was pro-competitive and used the "purpose or effect" analysis to distinguish the case involving an attempt at vertical integration. Some other antitrust defendant seeking to defend a program designed to promote interbrand competition by achieving permanent forward integration into the retail market might question whether the ruling of the Court of Appeals is consistent with the *Continental T. V.* decision in this respect, but that issue is not present here. What is clear now is that after *Glauser* there is no conflict between Ninth and Third Circuits with respect to the dealer enterprise and similar programs.

The major thrust of the petition is that a Writ of Certioari should be granted (a) because the decision below is, in petitioner's view, incorrect and (b) because the Court of Appeals for the Third Circuit should be disciplined for what Glauser Dodge characterizes as a long-standing aversion to private enforcement of the antitrust laws. That Glauser is disappointed with its loss is understandable, but that is insufficient basis for review by this Court. The decision of the Court of Appeals is not only consistent with the decisions of this Court,[12] but was fore-

11. Any sweeping reading of *United States v. Topco Associates, Inc.*, 405 U. S. 596 (1972), is contraindicated by the *Continental T. V.* decision. See fn. 27 at 433 U. S. 57.

12. Glauser admits that the decisions cited by it at pages 25-28 of its petition arose in different factual and legal contexts. *Id.* p. 28.

shadowed by *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477 (1977). The Court of Appeals for the Third Circuit there had ruled that where a bowling center was acquired by a "deep pocket" defendant in violation of § 7 of the Clayton Act, 15 U. S. C. § 18, a plaintiff could recover damages which resulted from *lawful* competition if it could establish that the bowling alley would have gone out of business (hence decreasing competition) had it not been acquired. In reversing the decision of the Court of Appeals, Mr. Justice Marshall said:

> "But the antitrust laws are not merely indifferent to the injury claimed here. At base, respondents complain that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration. The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. The anti-trust laws, however, were enacted 'for the protection of *competition*, not *competitors*' [citation omitted]. It is inimical to the purposes of these laws to award damages for the type of injury claimed here." 429 U. S. 488 (*emphasis original*)

Brunswick also answers petitioner's contention that the Court of Appeals for the Third Circuit is adverse to private enforcement of the antitrust laws. Indeed, in *Brunswick* this Court concluded that the Court of Appeals had sanctioned a theory of damages which was too favorable to antitrust plaintiffs, and penalized competition. The holding of the Court of Appeals in this case reflects not an aversion to antitrust enforcement, but recognition of the proposition that a program which promotes competition by providing the means to create new dealerships should not be condemned under § 1 of the Sherman Act.

CONCLUSION.

For the reasons stated above, the petition for Certiorari should be denied.

Respectfully submitted,

ROBERT S. RYAN,
MICHAEL O'S. FLOYD,
DRINKER BIDDLE & REATH,
1100 PNB Building
Philadelphia, PA 19107

WILLIAM E. REIFSTECK,
FARR, REIFSTECK and WOLF,
a Professional Corporation
Haddon Heights, N. J.
08035

Counsel for Chrysler Financial Corporation and Chrysler Credit Corporation.

JOHN P. HAUCH, JR.,
ARCHER, GREINER & READ,
a Professional Corporation
Haddonfield, N. J. 08033

Counsel for Chrysler Corporation, Chrysler Motors Corporation and Chrysler Realty Corporation.

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IN THE

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October Term, 1977.

No. 77-1275.

MARTIN B. GLAUSER DODGE CO.,
Petitioner,

v.

CHRYSLER CORPORATION, et al.,
Respondents.

PETITIONER'S REPLY BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI.

RALPH S. SPRITZER,
3400 Chestnut Street,
Philadelphia, Pa. 19104

TOM P. MONTEVERDE,
MORRIS L. CHUCAS,
MAX L. LIEBERMAN,
PELINO, WASSERSTROM, CHUCAS & MONTEVERDE,
2300 Packard Building,
Philadelphia, Pa. 19102
(215) 665-8550
Attorneys for Petitioner.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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PETITIONER'S REPLY BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI.

Respondents have failed to meet the Questions actually raised by petitioner. In the process they have characterized evidentiary matters in ways inconsistent with the verdict of the antitrust jury.

In order to place this case properly in focus, we shall, *first*, restate briefly petitioner's actual position as distinguished from that attributed to it by respondents; *second*, point out that respondents have signally failed to show that the questions raised by petitioner's contentions are lacking in importance.

I.

Contrary to respondents' repeated suggestions, we do not question Chrysler's prerogative to establish additional dealerships in the interest of enhancing its sales. Nor do we argue that Chrysler's efforts in creating and supporting new dealerships would make it vulnerable to attack under the antitrust laws merely because the incidental effect of injecting added competition at the dealer level might prove hurtful to some of the existing franchisees. Finally, we are not contending that Chrysler's establishment and support of DE dealers who competed with the petitioner is actionable simply because Chrysler could draw upon a deep pocket.[1]

1. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477 (1977), the Court held that private bowling alley proprietors could not recover damages simply by showing that they could have obtained additional profits if a manufacturer of bowling alley equipment had not attempted to recover sums owed it by failing bowling alleys which competed with those of the plaintiffs by taking over the operations of those alleys. The key fact in *Brunswick* was the Court's finding that, after obtaining control of the competing bowling alleys, Brunswick operated them properly and competed lawfully. As the Court pointed out, 429 U. S. at 490, Brunswick's "• • • contemporaneous business records • • • reveal(ed) that it did not lower prices when it took over the centers," and "• • •

That was not petitioner's theory at the trial, and it was not the theory upon which the case was submitted to the jury. Our position, briefly stated, is that it is one thing for a manufacturer like Chrysler to establish newly sponsored and supported dealerships that will compete on comparable terms with existing dealers who have ventured substantial capital in order to operate as Chrysler's franchisees; [2] it is quite another to discriminate sharply in favor of the newly created company-dominated dealers, extending to them terms, conditions and support not available to competitor dealers and calculated to damage or destroy the latter. As the district judge put it, the legitimate objective of creating added interbrand competition does "not immunize otherwise objectionable conduct" (A. 20). The wanton destruction of a trader by prejudicial treatment that undermines his ability to survive in the face of preferred treatment extended to neighboring competitors is no less a violation than would be a more rapid extinction by boycott. See *Klors v. Broadway Hale Stores,* 359 U. S. 207 (1959).

1. (Cont'd.)

respondent's own exhibits * * * demonstrat(ed) that (Brunswick) made a profit at two centers, * * * generated a positive cash flow at two others, * * * and closed the two centers that were unsuccessful." This record should be compared with the charts printed in the Appendix to our Petition which show a deliberate, long-standing and pervasive abuse of the deep pocket by Chrysler in the operations of its DE dealers generally, regionally, and locally, and in the operations of Chrysler Credit and Chrysler Financial, which absorbed additional losses which should have been, but were not, absorbed by the retail sales companies.

2. Respondents attempt to characterize their DE Program as paralleling those adopted by General Motors and Ford However, they offered no evidence whatever that the programs of those manufacturers had the same infirmities as Chrysler's, and the reported decisions and the statistics as to the number of antitrust cases pending in the district courts against Chrysler, General Motors and Ford (Petition, pp. 32, 35-39) tend strongly to indicate that this is not in fact so.

We use the term "wanton" advisedly. The district judge who heard the extensive evidence in this case not only concluded that it was sufficient to show "that as a result of the defendants' preferential treatment of the DE dealers Glauser Dodge was eventually forced out of business" (A. 18); he found further (A. 22) that

> ". . . defendants' desire to increase Chrysler's competitiveness on the interbrand level does not explain the reasonableness of their conduct. Indeed, this goal could have been more effectively pursued had the financial and other assistance which the defendants provided DE dealers, been extended to independent dealers as well."

Petitioner's claim that respondents engaged in a discriminatory course of action calculated to destroy petitioner was submitted to the jury by the charge of the district judge in the following words (A. 45-46):

> "[P]laintiff . . . complains that the Chrysler defendants combined or conspired in restraint of trade or commerce by adopting and pursuing the following course of conduct:
>
> "A. The creation and maintenance of better financed dealer enterprise dealerships for the purpose of penetrating the automobile market in which DE dealers competed with the plaintiff to its loss; [3]

3. Respondents argue (Brief, p. 5) that it "* * * is not in Chrysler's own interest to use its limited capital to invest in a dealership when other funds are available." Actually, by creating a DE dealership to market Chrysler products at low retail prices and heavily advertising those prices, Chrysler could lower the prices at which all Chrysler products were sold in a given market, and so increase its market penetration in those areas, and therefore its manufacturing profits. But this was accomplished at the expense not only of the DE dealerships, but of all competing private capital dealerships.

"B. Permitting DE dealers or factory stores to operate regularly in an out of trust condition and not so with Glauser;

"C. Advertising and selling cars through factory controlled outlets or DE dealers at prices which were lower than independent retail dealers, such as the plaintiff, could afford to charge; [4]

"D. Requiring private capital dealers, such as the plaintiff, to guarantee retail commercial paper while permitting competing DE dealers to sell such paper to Chrysler Credit without recourse; [5]

"E. Refusing to deliver when properly ordered new vehicles to the plaintiff in time for its opening, even

4. Respondents state (Brief, p. 9), "• • • the claim is not one of below cost pricing." This is simply not so. What the DE dealers were selling were new automobiles, and the evidence shows that those dealerships were consistently operated at a loss. The prime reason why this occurred, obviously, was that the DE operators were not charging enough money for their products, and, as a matter of fact, the evidence shows that these dealerships established gross profit margins which were significantly lower than those of the private capital dealers with which they competed (Petition, pp. 15-16). Respondents' Brief also states (p. 5) that, "• • • the dealership manager controls day to day operations and sets the prices." This is contrary to evidence that a Chrysler executive deliberately encouraged Cherry Hill Dodge to advertise new cars at their factory invoice price (Appendix below, A. 05736-37). Other evidence shows that, as soon as the first Chrysler DE operator "bought out" in South Jersey, there was a dramatic change in his method of operation. Whereas the gross profit of this dealership as a DE dealer had been $261.00 per vehicle as compared with a group average of $317.00 per vehicle during the first 6 months of 1970, the operator increased its gross profit margin to $303.00 per vehicle after he had bought out Chrysler's stock (Appendix below, A. 02711-14).

5. Contrary to a statement on page 4 of respondents' Brief, the evidence shows that Chrysler Credit offered "without recourse" financing to the DE dealers in South Jersey *before* they obtained competing bids for such business from private sources (Appendix below, A. 6316-18, A. 6250, A. 2733-35).

though an ample number of such vehicles were delivered to the DE dealers with whom the plaintiff competed;

"F. Effectively limiting by the use of recourse retail paper and other restrictions upon the plaintiff's credit the plaintiff's ability to participate in contests and specials on the same basis as competing DE dealers; and

"G. Providing superior physical facilities to DE dealers on terms which were not available to the competing private capital dealers such as the plaintiff Glauser." [6]

The court of appeals did not dispute the fact that there was evidence to support each of these claims. On the contrary, it stated (A. 46) that the "evidence offered in support of Glauser Dodge's Section 1 theory of recovery was in some respects undisputed and in other respects hotly contested." As to the contested evidence—much of it summarized by respondents in the light most favorable to the unsuccessful defendants rather than the successful plaintiff [7]—it of course suffices to say that the resolution of evidentiary disputes was a matter committed to the jury.

6. Contrary to another statement in respondents' Brief, they offered no convincing evidence that, at the time in question, private sources would have made such facilities available to their dealers on similar terms. Also, whatever was said on this subject was said by a Chrysler Realty employee whose testimony the jury had the exclusive right to evaluate (Appendix below, A. 01049-A. 01061).

7. Among other things, respondents state that Glauser Dodge income tax returns and bank statements reflected modest losses rather than modest profits and Glauser Dodge had cash flow problems and could not pay its debts toward to end of its business life. Respondents fail to state that the tax losses occurred because Glauser, like Chrysler's DE's, wrote down used cars and parts at year end to reflect uncertainties in valuations of those assets in the event of liquidation. Also ignored in respondents' recitation was the evidence, accepted evidently by the jury, to the effect that it

On what basis, then, has the court of appeals rejected the jury's verdict?

First, it asserts that respondents have not monopolized at the dealership level by forward integration, a point which was not only the subject of factual controversy,[8] but hardly dispositive of petitioner's Section 1 claim in any event.

Second, it concludes that, even if the effect of respondents' activities has been to eliminate petitioner, there

7. (Cont'd.)

was the discriminatory conduct of the respondents and their South Jersey DE dealers which produced Glauser's cash flow problems (Petition, pp. 19-20), and that, to the end, Glauser had assets sufficient to solve its cash and credit problems if Chrysler management would have accepted recommendations of local Chrysler personnel and provided Glauser with any one of several types of accommodation contemplated by the Quinn Memorandum and timely sought by Glauser (Appendix below, A. 05314; 790-793).

Respondents also mislead by ignoring the jury's verdict and giving their version of the evidence on contested issues with respect to the extent to which the DE's picked up sales previously made by Glauser (Brief, p. 4); the distance between Glauser's and the facilities of its DE competitors (30-45 minutes driving time, and much less than that for customers in intervening areas, according to Glauser), and the basis on which Glauser computed its damages (noted to be more conservative than otherwise in the district court's Opinion (A. 27)).

Also, on p. 11 of their Brief, respondents attempt to justify the entry of judgment N. O. V. in this case by citation of stipulations obtained from other lawyers in another case, with another plaintiff, and at another time.

8. Respondents' own figures show that sales by factory controlled dealerships increased from 17% to 36% nationally (A. 1) and from 20% to 42.5% regionally over a 7-year period while the policies complained of were being implemented (Appendix below, A. 01100.01). The evidence also shows that Dodge private capital dealerships disappeared at 11 of 33 locations in petitioner's trade area during that period (Appendix below, A. 05574). Also, at least one such dealer in addition to petitioner's principals did complain at the time and did testify at trial that his dealership was destroyed by the same actions complained of by Glauser (Appendix below, A. 947-58).

is abundant competition and hence no violation. We believe that this is in gross disregard of the teaching of the *Klors* case—in effect, a ruling that a lawful objective, such as promotion of interbrand competition, may justify an unlawful means; indeed, may justify it even where the objective, in the district judge's words, might "have been more effectively pursued" by giving similar support to independent dealers instead of discriminating against them. Surely, this is a matter that demands this Court's examination.

Third, the court of appeals discounts the force of petitioner's showing of destructive discrimination by the remarkable suggestion that if parties other than Chrysler had extended subsidies to petitioner's competitors that gave them advantages over petitioner, petitioner would have no cause for complaint. Thus the court states (A. 50):

> ". . . the effect on competition would be the same if the subsidies of which Glauser Dodge complains came from a source other than Chrysler. For example, if, instead of Chrysler's investments, the four DE dealers had obtained more favorable lines of credit with banks and higher private venture capital investment, their ability to subject the plaintiff to intense price competition would be the same."

To be sure, if petitioner had raised capital on unfavorable terms or had been improvident in its operations, the market might well have penalized it. There is absolutely no evidence that such is the case. Nor is there any persuasive evidence that specially advantageous terms were available to DE dealers from sources other than Chrysler. Indeed, Chrysler's own evidence is that it sponsored and supported

the DE dealers in the ways that it did because they would not have entered the field on the terms available in the marketplace (Appendix below, A. 165, A. 168, A. 3596, A. 3945). This may fully explain Chrysler's decision to support the new dealerships. It does not, however, justify gratuitous, calculated and pervasive discrimination against private capital dealers.

It is also notable that the court of appeals limits its discussion of discrimination to Chrysler's subsidization of DE dealers through "capital investments, absorption of start-up expenses, and favorable credit arrangements" (A. 59). Apart from the fact, already noted, that there is no basis for suggesting that outsiders would have undertaken to confer such benefits upon the DE dealers, we point out that the court ignores other critical aspects of Chrysler's discrimination. These include, as earlier observed:

> "C. Advertising and selling cars through factory controlled outlets or DE dealers at prices which were lower than independent retail dealers, such as the plaintiff, could afford to charge.
>
> * * *
>
> "E. Refusing to deliver when properly ordered new vehicles to the plaintiff in time for its opening, even though an ample number of such vehicles were delivered to the DE dealers with whom the plaintiff competed.
>
> * * *
>
> "G. Providing superior physical facilities to DE dealers on terms which were not available to the competing private capital dealers such as the plaintiff Glauser."

Plainly, all of these were forms of preferential treatment that Chrysler alone was in a position to bestow on its favored offspring.

Confining ourselves, for the sake of brevity, to the matter of price discrimination, we emphasize that it was unmistakably predatory to sell through DE dealers at advertised prices that the independent dealer could not profitably meet while picking up the losses incurred by the DE dealers as a result of their selling at those unremunerative prices. We assume that selling cars at retail at low advertised prices may have strengthened Chrysler vis-à-vis competing manufacturers of automobiles. There was no obstacle, however, to achieving that end by lowering wholesale prices to independent dealers so as to enable them to sell at the advertised prices.[9] The decision not to do so, but, instead, to squeeze the independents while subsidizing the company-controlled DE dealers, is the very essence of discrimination. There can be no question that conduct falling into that pattern is calculated to destroy traders, as in fact it destroyed this petitioner. To grant immunity to such conduct is incompatible, we submit, with the "rule of reason" as that concept previously has been elaborated in decisions of this Court.

II.

From the first, this Court has given great weight to jury determinations that a defendant has engaged in conduct in restraint of trade, see, e.g., *Thomsen v. Cayser*, 243

9. On page 8 of their Brief, respondents state that, for Chrysler to have supported all of its dealers as it did its DE's would have been "financially unsupportable". No witness ever testified to that effect nor was this even argued below. In any event, what made the DE's so expensive was not that they were created, but that they were operated to increase market penetration quickly. This they did by cutting retail prices. But that produced operating losses at the retail level.

U. S. 66 (1917). It has also consistently rejected assertions by a defendant that good business reasons will justify conduct of a kind antithetical to the antitrust statutes. E.g., *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951), rejecting the claim that the fixing of maximum prices may be justified on the ground that the defendant was thereby promoting distribution of its whiskey. More particularly, we know of no decision of this or any other court holding that a jury is not legally justified in finding that a manufacturer unreasonably restrains trade when a manufacturer discriminates in favor of its factory controlled dealerships and against its private capital dealers in the manner in which the jury, the district court, and the court of appeals concluded occurred here. That such a course of action restrains trade unreasonably is the teaching of this Court in *Eastman Co. v. Southern Photo Co.*, 273 U. S. 359 (1927), and *Poller v. Columbia Broadcasting System*, 368 U. S. 464 (1962), as well as many courts of appeals, including *Reynolds Metal Company v. F. T. C.*, 309 F. 2d 223, 230 (D. C. Cir. 1962); *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F. 2d 1336 (9th Cir. 1970); *Rea v. Ford Motor Co.*, 497 F. 2d 577, 590 (3rd Cir. 1974); *Coleman Motor Co. v. Chrysler Corp.*, 525 F. 2d 1338 (3rd Cir. 1975); and *Southern Blowpipe & Roofing Co. v. Chattanooga Gas Co.*, 360 F. 2d 79 (6th Cir. 1976), cert. denied, 393 U. S. 844 (1976).

Respondents have made no effort to distinguish between the legal principles recognized in those cases and the principles which the jury and the district court applied here. Furthermore, contrary to respondents' contentions, those authorities are consistent, and not in conflict, with *England v. Chrysler*, 493 F. 2d 269 (9th Cir. 1974), which, while distinguishable from our case on its facts, explicitly recognized that:

> "* * * Predominent emphasis on market penetration, which results in the deliberately reckless operation of a subsidized dealer and which has the inevitable effect of forcing competing and non-subsidized dealers to function at an unprofitable level, could, if proved, constitute an unreasonable restraint of trade" (493 F. 2d at 273).

The charts on A. 1-6 clearly justified the jury's conclusion here that the respondents operated their subsidized dealerships nationally, regionally and in southern New Jersey in a manner which was "deliberately reckless", in terms of their willingness to sustain repeated losses,[10] and that this did in fact produce significant market penetration on the part of such dealerships. The charts on A. 5-6 confirm that Chrysler Credit and Chrysler Realty, which supported and further subsidized the factory controlled dealerships, also operated in a manner which, when viewed independently, can only be characterized as "deliberately reckless". Furthermore, when the overall statistics are matched with the evidence (A. 7) concerning the ridiculously low gross profit levels at which the South Jersey DE dealers forced the plaintiff and other privately capitalized dealers in the area to function, it is equally clear that the jury had a sound basis for concluding, to paraphrase the *England* opinion, that defendants' policies had "* * * the inevitable effect of forcing competing and non-subsidized dealers to function at an unprofitable level

10. It should also be noted that the DE's sustained these losses even though, unlike Glauser Dodge, they operated in subsidized facilities, had priority over Glauser Dodge in deliveries of new automobiles and were relieved of repossession losses of $1200 per automobile and the necessity of making short term loans by their non-recourse, no reserve arrangements with Chrysler Credit; also, by Chrysler Credit's permitting the DE's to be out of trust for months at a time (A. 13).

and" could, therefore, "° ° ° constitute an unreasonable restraint of trade".

Respondents also seek to suggest that this case is lacking in significant economic effects on the ground that there was no evidence that forward vertical integration resulted from the defendants' policies. In similar vein, they argue that the effects of the DE program were transient, i.e., Chrysler controlled the DE dealers only temporarily. If these suggestions were correct—and we submit that they are not—they would not support a legal conclusion that the destruction of petitioner by means that were both discriminatory and gratuitous would absolve Chrysler of liability. In fact, both suggestions are misleading.

At no time prior to the decision of the court of appeals did the respondents ever argue *that they were entitled to judgment as a matter of law* because there was *no evidence* that their policies produced "forward vertical integration". Plainly, there is evidence (A. 1; fn. 8, *supra*) supporting a contrary conclusion. Respondents' current arguments are based on their version of the facts respecting the South Jersey DE dealers. What the evidence actually shows is that none of these DE operators was able to acquire Chrysler's stock by completely repaying Chrysler's investment (Appendix below, A. 2522, 2704-11, 2718-32). Also, even when they bought out the dealerships, as the Chrysler chart reprinted as Exhibit A-1 shows, were still part of Chrysler's Dealer Enterprise Program because they were still operating in Chrysler facilities, i.e., they were still paying rents which, unlike those available to private capital dealers, included no increments for dealer development costs, depreciation, mortgage amortization, or profit. Furthermore, even when they "bought out", those operators were still subject to Chrysler control in that they were both subsidized and operating under leases which required

that they continue to sell Chrysler products if they wished to continue to operate on the premises (Appendix below, A. 943). As a result, by 1973, 72.5% of new Dodge sales in South Jersey were being made by Chrysler controlled and Chrysler subsidized dealers (Appendix below, A. 01100-01).

As we also pointed out in our Petition (p. 40), the underutilization of manufacturing capacity which allegedly gave rise to the DE Program was eliminated by the time the Glausers began business. The evidence also shows that, whatever success the South Jersey DE dealerships eventually achieved in the marketplace was gained, at least in substantial part, at the expense of privately capitalized dealers such as the plaintiff with which the DE dealers originally competed. The private dealerships were not temporarily injured by the discriminatory features of the DE Program; they were first squeezed, then ultimately destroyed.

CONCLUSION.

This is a case in which the evidence was plainly sufficient to show "deliberately reckless operation of °°° subsidized dealer(s)" (*England v. Chrysler, supra,* 493 F. 2d at 273), inevitably forcing independently financed dealers to the wall. The jury so found under instructions that carefully identified the specific claims of preferential and predatory conduct charged to Chrysler by the plaintiff dealer. The district judge upheld that verdict in an opinion that not only found the supporting evidence sufficient, but concluded that Chrysler's alleged objective of promoting interbrand competition could have been "more effectively pursued" by supporting, rather than discriminating against, independent dealers. The court of appeals has not found the evidence insufficient to support

the claims submitted to the deliberations of the jury. Rather, it has adopted a view of Section 1 of the Sherman Act and of the "rule of reason" that departs sharply from accepted doctrine and demands this Court's examination. The importance of the antitrust issue thus presented is underscored by the fact that the antitrust defendants in this litigation are members of a highly concentrated industry and that the antitrust plaintiff is a typical member of a large and important, but highly vulnerable, class—that consisting of the nation's franchised dealers.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RALPH S. SPRITZER,

TOM P. MONTEVERDE,
MORRIS L. CHUCAS,
MAX L. LIEBERMAN,
PELINO, WASSERSTROM, CHUCAS
& MONTEVERDE,
Attorneys for Petitioner.

MOTION FILED
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In The

Supreme Court of the United States

October Term, 1977

No. 77-1275

MARTIN B. GLAUSER DODGE CO.,

Petitioner,

vs.

CHRYSLER CORPORATION, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

JOHN G. BONOMI
Attorney for Applicant
630 Fifth Avenue
New York, New York 10020
(212) 397-9700

854 LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 New York, N.Y. (212) 840-9494 Philadelphia, Pa. (215) 563-5587 Washington, D.C. (202) 783-7288

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Reason for Granting the Writ:

The decision below threatens the business of all independently financed franchised dealers in all oligopolistic industries and the economic and cultural life and independence of our communities, is of great public importance, and should therefore be reviewed by this Court. 6

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October Term, 1977

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MARTIN B. GLAUSER DODGE CO.,

Petitioner,

vs.

CHRYSLER CORPORATION, et al.,

Respondents.

MOTION OF *INDEPENDENT DEALERS COMMITTEE DEDICATED TO ACTION* FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

Independent Dealers Committee Dedicated to Action, by its undersigned attorney, moves for leave to file a brief *amicus curiae* in support of the petition for writ of certiorari. The brief which applicant proposes to file accompanies this motion.

Applicant is a national organization of independently financed automobile dealers who as such are interested in this case.

The decision of the United States Court of Appeals for the Third Circuit will have effects extending far beyond the parties,

encompassing all independently financed automobile dealers, for whom applicant is a spokesman, and all independently financed franchised dealers in all oligopolized basic industries. That decision will result in the funnelling of the profits of such franchised dealers out of the communities in which they are located and into the treasuries of the oligopolistic manufacturers, to great public detriment.

This wide impact of the decision below should be before the Court when it considers the petition and it can be presented to the Court more readily by an organization such as applicant than it can by petitioner, which is, perforce, limited in its presentation to the issues which directly affect it.

Respondents have refused their consent to the filing of applicant's proposed brief.

It is therefore respectfully prayed that applicant's motion be granted.

Respectfully submitted,

JOHN G. BONOMI
Attorney for Applicant
630 Fifth Avenue
New York, New York 10020
(212) 397-9751

In The

Supreme Court of the United States

October Term, 1977

No. 77-1275

MARTIN B. GLAUSER DODGE CO.,

Petitioner

vs.

CHRYSLER CORPORATION, et al.,

Respondents.

BRIEF OF *AMICUS CURIAE, INDEPENDENT DEALERS COMMITTEE DEDICATED TO ACTION* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the district court is reported at 418 F. Supp. 158 and is reproduced at pp. A8-A32 of the separately bound appendix to the petition ("App."). The opinion of the court of appeals is reported at 570 F.2d 72 and is reproduced at App. A33.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1977 (App. A61). A timely petition for rehearing was denied on December 14, 1977 (App. A63). The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTION PRESENTED

Where corporations in an oligopolized basic industry, by combination, pursue practices which favor one class of franchised retail dealers over another and permit the favored class of dealers to charge prices on retailed sales lower than those which must be charged by the unfavored dealers, with the result that the unfavored dealers are destroyed and profits are diverted from local dealers and local communities to the oligopolies, are such practices reasonable and not in violation of Section 1 of the Sherman Act because their effect is to make manufacturing profitable while making retail dealership unprofitable?

STATUTES AND RULE INVOLVED

This case involves Section 1 of the Sherman Antitrust Act (hereinafter "the Act"), 26 Stat. 209 as amended by 50 Stat. 693 and 69 Stat. 282, 15 U.S.C. Section 1, and Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. Section 15. Those statutes are printed in the statutary appendix to the petition at p. 46 and are therefore not reproduced here.

STATEMENT OF THE CASE*

This brief of *amicus curiae* is submitted pursuant to leave to file it granted by the Court on the motion of *amicus*, consent having been denied by respondents.

---

* The facts stated in this statement are based upon information supplied to counsel by *amicus*.

Amicus is a voluntary association of several hundred privately financed new car dealers (PC's) organized some fifteen years ago by a group of Metropolitan New York Dodge dealers but now of national scope. It was organized in response to what its members believe were and are the predatory and anti-competitive practices of respondents through and with their Dealer Enterprise (DE) dealers.

Amicus has followed the case at bar as one which involved the fortunes of its members and it learned with great concern of the decision of the court below ordering judgment n.o.v. for respondents.

Amicus has learned from petitioner of its petition for a writ of certiorari and has been provided with a copy of the petition and its appendix.

Because of the potential, great adverse effect of the decision below on its membership, who are directly interested in the outcome, *amicus* has decided to submit this brief to the Court to urge upon the Court its views as to the importance of the issues here presented and its reason why the writ should be granted.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW THREATENS THE BUSINESS OF ALL INDEPENDENTLY FINANCED FRANCHISED DEALERS IN ALL OLIGOPOLISTIC INDUSTRIES AND THE ECONOMIC AND CULTURAL LIFE AND INDEPENDENCE OF OUR COMMUNITIES, IS OF GREAT PUBLIC IMPORTANCE, AND SHOULD THEREFORE BE REVIEWED BY THIS COURT.

A.

1. DE dealerships proliferated absolutely and relatively.

In the period from 1964 to 1970, the number of Dodge DE dealerships increased from 105 to 163 and the percent of total Dodge sales done by the DE dealers increased from 12.1% to 18.4% (App. A1).

2. DE dealerships proliferated although they were spectacularly unprofitable.

Total DE profits in 11 months of 1964 were $149,8.. an average of some $1,400 per dealership. In 11 months of 1970, their *losses* were $7,191,781, an average *loss* per DE dealer of some $44,000. For the entire seven year period, all the DE dealerships accrued total *losses* of approximately $10,380,000 (App. A1). Furthermore, these losses occurred even though Chrysler Credit absorbed all repossession losses for the DE's and spared them from making short-term loans to cover cash shortages by absolving the DE's from establishing repossession reserves and permitting the DE's to function on an "out-of-trust" basis for months at a time. Likewise, the DE's consistently reported losses even though they received rent subsidies from Chrysler Realty averaging from $25,000 to $41,500 per year (App. A6).

3. The losses of the DE dealers resulted from the fact that each car they sold (on the average) was sold at a loss.

For the whole seven year period, each sale of a car by a DE dealer resulted in a *loss* of $15.92, on the average (App. A1).

4. The respondents' distribution system was such that it subsidized the losses of the DE dealers and thus enabled them to sell cars at prices resulting in losses, and still to proliferate.

The respondents subsidized the losses and the retail price cutting of the DE dealers by (App. A46-47):

a. Providing financing on more favorable terms than could be obtained in the open market;

b. Providing show-rooms and shops at rentals below what could be obtained in the free rental market;

c. Purchasing DE installment sales contracts on a non-recourse basis;

d. Absorbing the annual losses of DE dealers year after year;

e. Permitting DE dealers to operate in out-of-trust condition, *i.e.*, permitting DE dealers without penalty to sell cars covered by floor inventory plan loans without accounting immediately for the proceeds of the sales;

f. Favoring DE dealers in the delivery of cars for important, factory-advertised promotional events, such as the 1969 Announcement Day. (On this, see also, App. A22.)

5. Respondents' planned subsidization of DE losses permitted DE dealers to sell cars at unnaturally low prices and they did so.

From the facts that the DE dealers suffered constant losses which were subsidized by respondents, and sold cars at per-unit losses, it necessarily follows that the DE dealers, taking advantage of respondents' subsidies, sold cars at retail at unnaturally low prices, which they could not, and would not, have done without the subsidies.

The district court said (App. A19):

> "There was evidence adduced at the trial to show that: (1) Cars were advertised and sold through DE dealers at prices which were lower than private capital dealers . . . could afford to charge. . . ."

The court of appeals said (App. A47): "[T]he jury could have found that the DE dealers did subject private dealers to intense price competition."

6. PC dealers received no subsidies from respondents (App. A46-47).

7. PC dealers could not therefore meet the price competition of the DE dealers and were forced out of business.

"There was sufficient evidence adduced at the trial to permit the jury to infer that as a result of the defendants' preferential treatment of the DE dealers, Glauser Dodge was eventually forced out of business." (App. A18).

In the Southern New Jersey market area, while the percentage of Dodge sales by DE's and former DE's operating in Chrysler subsidized facilities increased from 20% in 1964 to 42.5 percent in 1972, the number of PC dealers, which was 33 in 1964, declined to 22 by 1972. (See Petition, p. 17.)

8. Respondents were able to subsidize and bear the retail losses because they absorbed them at the manufacturing level.

"The program consistently produced net operating losses at the dealer level, but greater market penetration and the resulting increases in production permitting more efficient utilization of manufacturing facilities. Thus, as was explained by plaintiff's expert, Dr. Kuehn, the retail losses were offset by increased profits at the manufacturing level." (App. A12-13).

9. Accepting, as it was obliged to, all of the foregoing facts, the court of appeals nevertheless ordered judgment n.o.v. for respondents because, in its opinion, the restraint of trade, which the jury had found was involved in the above-described situation, was reasonable.

It is difficult to comprehend the rationale behind the result reached by the court below. It would seem fair to say, however, that the essence of its reasoning is embodied in the portion of its opinion reproduced at App. A59-60, and that this reasoning cannot withstand scrutiny.

The court there asks: "whether a manufacturer's subsidization of its partially or wholly owned dealerships [under the circumstances described above] for the purpose of achieving market penetration violates Section 1"?

The court gives this surprising answer to its question: the subsidization does not violate Section 1 because financing might have come to the DE dealers from sources other than respondents, "banks and higher venture capital investment."

While it is *amicus'* purpose here simply to describe what occurred below to demonstrate the vital problem thereby created, it must be said in passing that the court seems to have missed the point. *Only respondents,* able to absorb the DE losses at the manufacturing level, would have financed the continuous

DE losses which resulted from price cutting at the retail level. It is hard to conceive of any "banks and higher private venture capital investment" willing to invest in long-term losses resulting from the under-pricing of the products sold. It is highly unlikely that any South Jersey bank or private investor, no matter how high venturer he might be, would willingly have gone into competition with respondents' long purse and ability to recoup retail investment losses at the manufacturing level. In any event, respondents never produced evidence that any private venturer was willing to do this.

B.

If the court of appeals is right, and respondents' conduct was "reasonable" and therefore not in violation of Section 1, then the shrinking opportunities for private capital and private entrepreneurs will shrink further at an accelerated rate, not just among Dodge dealers in South Jersey, but among all automobile dealers everywhere, including the members of *amicus*, and among dealers in all oligopolistically controlled industries.

As a consequence, profits now being earned, or which otherwise would be earned, by local enterprises, which nourish the economic and cultural life and the independence of our communities, will be sucked out of the communities and into the treasuries of the national manufacturers, with likely devastating effect on those communities.

From the viewpoint, therefore, of the membership of *amicus* and all similarly situated individual businessmen, and from the viewpoint of all who value or have a stake in independence in the lives of our communities, the decision below presents a great danger and is of great public importance.

Therefore, the questions raised by the petition merit review by this Court.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

JOHN G. BONOMI
Attorney for Amicus Curiae

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-1275.

MARTIN B. GLAUSER DODGE CO.,
Petitioner,

v.

CHRYSLER CORPORATION, et al.,
Respondents.

OBJECTION TO PETITION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

WILLIAM E. REIFSTECK,
FARR, REIFSTECK AND W[illegible],
A Professional Corporation,
Haddon Heights, N. J. 08035
Counsel for Chrysler Financial Corporation and Chrysler Credit Corporation.

ROBERT S. RYAN,
MICHAEL O'S. FLOYD,
DRINKER BIDDLE & REATH,
1100 PNB Building,
Philadelphia, Pa. 19107

JOHN P. HAUCH, JR.,
ARCHER, GREINER & READ,
A Professional Corporation,
Haddonfield, N. J. 08033
Counsel for Chrysler Corporation, Chrysler Motors Corporation and Chrysler Realty Corporation.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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The petition for certiorari in this case was filed on March 14, 1978. Respondents' brief in opposition was filed on April 13, 1978. Petitioner filed a reply brief on

May 1, 1978. Thereafter, an organization which terms itself "Independent Dealers Committee Dedicated To Action" submitted a petition (received by Respondents on May 8, 1978) for leave to file a brief amicus in support of the petition for certiorari. The brief itself is attached to the petition. See to the contrary Rule 42(3).

The Respondents withheld their consent to the filing of a "brief amicus" for three reasons.

1. The decision of the Court of Appeals was entered on November 14, 1977 (rehearing denied December 14, 1977). The proposed "amicus" brief states that the amicus organization "followed the case at bar as one which involved the fortunes of its members". Proposed Brief, p. 5. Any organization with an interest in the case had ample time to determine whether it wanted to seek permission to support any petition for certiorari. A brief amicus in support of a petition for certiorari should be filed a reasonable time before the response to the petition for certiorari is filed. See Rule 42(1). It is not properly used as a reply brief.

2. The Respondents see no reason why the Petitioner itself cannot adequately present any arguments with respect to its petition for certiorari.

3. While the Respondents do not have detailed information concerning the organization and membership of the "Independent Dealers Committee Dedicated To Action", they believe that the organization represents substantially less than 1% of the automotive dealerships in the United States, and that it does not speak for any important portion of the total dealership body.

Respectfully submitted,

ROBERT S. RYAN,
MICHAEL O'S. FLOYD,
DRINKER BIDDLE & REATH
1100 PNB Building
Philadelphia, PA 19107

WILLIAM E. REIFSTECK,
FARR, REIFSTECK AND
WOLF,
A Professional
Corporation
Haddon Heights, N. J.
08035

Counsel for Chrysler Financial Corporation and Chrysler Credit Corporation.

JOHN P. HAUCH, JR.,
ARCHER, GREINER & READ,
A Professional
Corporation
Haddonfield, N. J. 08033

Counsel for Chrysler Corporation, Chrysler Motors Corporation and Chrysler Realty Corporation.

May, 1978